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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 331.

HENRY B. F. MACFARLAND, JOHN W. ROSS, AND JOHN BIDDLE, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLANTS,

vs.

JESSE BROWN AND ROSA WALLACH.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MAY 24, 1902.

(18,540.)

(18,540.)

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1 In the Court of Appeals of the District of Columbia.

JESSE BROWN ET AL., Appellants,
vs.
HENRY B. F. MACFARLAND ET AL., Comm'rs, D. C. } No. 1142.

Supreme Court of the District of Columbia.

In re EXTENSION OF SHERMAN AVENUE. No. 555, District Court.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Petition.

Filed May 31, 1899.

In the Supreme Court of the District of Columbia, Sitting as a District Court of the United States for said District.

In re EXTENSION OF SHERMAN AVENUE. District, No. 555.

To the supreme court of the District of Columbia, sitting as a district court:

The petition of John B. Wright, John W. Ross, and Lansing H. Beach, Commissioners of the District of Columbia, respectfully shows as follows:

1. That Congress by an act approved March 3, 1899, entitled "An act for the extension of Pennsylvania avenue southeast, and for other purposes," directed that "within ninety days after the approval of this act the Commissioners of the District of Columbia be, and they are hereby authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a district court, a proceeding to condemn the land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet," under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia.

2. That a map of the proposed extension and widening of Sherman avenue, showing the number and designation of lots affected, the names of the owners thereof, and the areas of land required for the extension, has been prepared and a copy thereof is hereto annexed as part of this petition, marked "Exhibit D. C. No. 1."

2 3. That said act provides, among other things, "that of the amount found due and awarded for damages for and in respect of the land condemned under this act for the extension and

widening of said Sherman avenue not less than one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting on both sides of Sherman avenue, and the extension thereof as herein provided, to a distance of three hundred feet from the building lines of the east and west sides of Sherman avenue as widened and extended: Provided, that no assessment shall be made against those pieces or parcels of ground out of which land has already been dedicated to the District of Columbia for the purpose of widening Sherman avenue as herein provided for."

Wherefore your petitioners pray this honorable court to direct the marshal of the District of Columbia to summon a jury of seven judicious, disinterested men, not related to any party interested, and to be and appear on the premises on a day specified, to assess the damages, if any, which each owner of land through which Sherman avenue is proposed to be extended and widened, as aforesaid, may sustain by reason thereof, and that such other and further orders may be made and proceedings had as are contemplated by said act of Congress and by chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, to the end that a permanent right of way for the public over the said lands may be obtained and secured for the aforesaid extension and widening of Sherman avenue; and they will ever pray, etc.

JOHN B. WIGHT,
JOHN W. ROSS,
LANSING H. BEACH,
Commissioners of the District of Columbia.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for Petitioners.

Order for Appearance of Interested Parties.

Filed September 16, 1899.

In the Supreme Court of the District of Columbia, Sitting as a District Court.

In re THE EXTENSION AND WIDENING OF SHERMAN AVENUE.
No. 555.

Notice is hereby given that the Commissioners of the District of Columbia, pursuant to the provisions of an act of Congress approved March 3, 1899, entitled "An act for the extension of Pennsylvania avenue southeast, and for other purposes," have filed a petition in this court praying the condemnation of the land required for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet, as shown on a plat or map prepared by said Commissioners and
3 annexed to their said petition and marked "Exhibit D. C. No. 1," and praying also that a jury be summoned by the

marshal in accordance with the provisions of chapter eleven (11) of the Revised Statutes of the United States relating to the District of Columbia, to ascertain the damages for and in respect of the land proposed to be condemned for the extension and widening of said Sherman avenue, and to assess not less than one-half thereof against those pieces or parcels of ground abutting on both sides of Sherman avenue, and the extension thereof as therein provided, to a distance of three hundred feet from the building lines on the east and west sides of Sherman avenue as widened and extended: Provided, that no assessment shall be made against those pieces or parcels of ground out of which land has already been dedicated to the District of Columbia for the purpose of widening Sherman avenue as therein provided for.

It is ordered this 16th day of September, A. D. 1899, that all persons interested in the proceedings be, and they are hereby, required to appear in this court on or before the 2d day of October, 1899, to show cause, if any they have, why the prayer of said petition should not be granted and why the proceedings directed in said act of Congress should not be taken.

Provided a copy of this order be published in the Evening Star and the Washington Times newspapers at least six times, and in the Washington Law Reporter once, before said 2d day of October, 1899.

By the court:

CHAS. C. COLE,
Asso. Justice.

Filed May 9, 1900.

UNITED STATES OF AMERICA, } *ss:*
District of Columbia, }

We, the undersigned jury, summoned and impaneled by the marshal of the District of Columbia, to ascertain and award the damages which each owner of land may sustain by reason of the condemnation of land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform depth of one hundred feet, shown on a map or plat prepared by the Commissioners of the District of Columbia and annexed to their petition in said case; to assess at least one-half of said damages against those pieces or parcels of ground abutting that portion of the street to be widened and extended to a depth of three hundred feet from the building lines of said Sherman avenue as widened and extended, excepting those parcels of ground out of which land has already been dedicated for the widening of said avenue, as aforesaid, as provided by the act of Congress approved March 3, 1899—

Do solemnly swear on our several oaths that we are disinterested, not related to any party interested in any of the property in any way affected by this proceeding, and that without favor or partiality to any one, to the best of our judgment, we will decide what damages each owner may sustain by reason of the ex-

tension and widening of Sherman avenue, as aforesaid, and that we will assess at least one-half of the aggregate amount of said damages as provided by law

A. D. HAZEN. [SEAL.]
GEO. W. MOSS. [SEAL.]
HENRY F. BLOUNT. [SEAL.]
E. S. PARKER. [SEAL.]
NOBLE D. LARNER. [SEAL.]
ROBT I. FLEMING. [SEAL.]
H. B. PARKER. [SEAL.]

Subscribed and sworn to before me this seventh day of February, 1900.

AULICK PALMER,
U. S. Marshal,
By W. B. ROBINSON,
Chief Deputy Marshal.

Verdict of Jury.

Filed May 9, 1900.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re THE EXTENSION AND WIDENING OF SHERMAN AVENUE.

We, the jury in the above-entitled cause, hereby find the following verdict and award of damages for and in respect of the land condemned and taken necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet, as shown on the plat or map filed with the petition herewith, as set forth in Schedule One, hereto annexed as a part hereof.

And we, the jury aforesaid, in accordance with the act of Congress approved March 3d, 1899, for the extension and widening of said avenue, do hereby assess the sum of $77,293.50, being one-half of the damages, as aforesaid, as awarded in Schedule One hereto annexed, against those pieces or parcels of ground abutting on both sides of said Sherman avenue and the extension thereof, as provided by said act, to a distance of three hundred feet from the building line on the east and west sides of said Sherman avenue as widened and extended, which we find will be benefited by the widening and extension of said avenue, as set forth in Schedule Two, which is hereto annexed and made a part hereof.

Witness our hands and seals this first day of May, A. D. 1900.

HENRY F. BLOUNT. [L. S.]
E. S. PARKER. [L. S.]
ROBT I. FLEMING. [L. S.]
NOBLE D. LARNER. [L. S.]
GEO. W. MOSS. [L. S.]
HARRY B. PARKER. [L. S.]

5 I agree fully with my colleagues of the jury with regard to the damages awarded for property taken, but regret that I cannot agree with the majority of them on the question of an equitable apportionment among the several pieces of land of the gross amount assessed as benefits and needed to meet the award for damages.

A. D. HAZEN.

SCHEDULE 1.

Block.	Lot.	Area.	Per ft.	Award.	Owner.
Todd and Brown's subdivision.	*	*	*	*	*
	19	Of 3 N.	5,487.5	$4,116.00	Rose Wallach & Jesse Brown.
		Church	on north	part of	$400.00	" " "
		Lot 3	.....	.....	*	*
	*	*	*	*	$900.00	Rose Wallach & Jesse Brown.
	18	1	1,500.0	.....	$200.00	" " "
		House	on lot 1	.....	$750.00	
		13	1,500.0	.....	*	*
	*	*	*	*	$675.00	Rose Wallach & Jesse Brown.
	17	17	1,500.0	.....	$675.00	" " "
		18	1,500.0	.....	*	*
	*	*	*	*	$675.00	Rose Wallach & Jesse Brown.
	15	1	1,500.0	.....	$675.00	" " "
		12	1,500.0	.....	*	*
	*	*	*	*	$675.00	Rose Wallach & Jesse Brown.
	14	10	1,500.0	.....	$600.00	" " "
		11	1,500.0	.....	*	*
	*	*	*	*	$600.00	Rose Wallach & Jesse Brown.
	13	13	1,500.0	.....	*	*
	*	*	*	*	$600.00	Rose Wallach & Jesse Brown.
	12	15	1,500.0	.....	*	*
	*	*	*	*	$600.00	Rose Wallach & Jesse Brown.
	11	8	1,500.0	.....	*	*
	*	*	*	*	$450.00	Rose Wallach & Jesse Brown.
	7	14	1,000.0	.....	$400.00	" " "
		House	on lot 14	.....	$450.00	" " "
		15	1,000.0	.....	*	*
	*	*	*	*	$450.00	Rose Wallach & Jesse Brown.
	5	12	1,000.0	.....	$400.00	" " "
		13	1,000.0	.....	$400.00	" " "
		14	1,000.0	.....	$400.00	" " "
		15	1,000.0	.....	*	*
	*	*	*	*	$450.00	Rose Wallach & Jesse Brown.
	*	17	1,000.0	.....	*	*
		*	*	*	$350.00	Rose Wallach & Jesse Brown.
Wright and Cox's subdivision.		11	584.7	.....	$200.00	" " "
		House	on lot 11	.....	$671.00	" " "
		12	1,119.3	.....	$992.00	" " "
		13	1,653.9	.....	$100.00	" " "
		House	on lot 13	.....	*	*
	*	*	*	*	$1,350.00	Rose Wallach & Jesse Brown.
		20	4,500	.....	$1,290.00	" " "
		21	4,300.4	.....	$34.00	" " "
		22	114.8	.....	*	*
	*	*	*	*		

6 *Exceptions of Appellants.*

Filed July 22, 1901.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re Extension and Widening of Sherman Avenue. No. 555, Dist. Court, Docket No. 2.

Now comes here *Jesse Brown* and *Rose Wallach*, owners of *lots 11, 12, 13, 20, 21 and 22, 28, 29, 32, 36, and 37, in Wright and Cox's subdivision*, and of *lots 8 to 21*, both inclusive, *in block 5; lots 8 to 11*, both inclusive, and *lots 14 and 15, block 7; lots 2, 3, and 8, block 11; lots 5, 8 and 15, block 12; lots 4, 5, 8, 11, 12, 13, and 15, block 13; lots 4, 7, 10, and 11, block 14; lots 1, 4, 6, and 12, block 15; lots 12 and 13, block 16; lots 5, 17, 18, block 17; lots 1, 4, 5, and 13, block 18, and part of lot 3, block 19, of Todd and Brown's subdivision*, involved in these proceedings, and object to the confirmation of the verdict, award, and assessment of the jury in this case filed herein May 9, 1900, for the following reasons:

Because the damages allowed by said jury are insufficient, inadequate, and against the weight of evidence submitted to said jury in respect thereto.

Because the benefits assessed by said jury are excessive, ex*hor*bitant, inconsistent, and against the weight of the evidence submitted to said jury in respect thereto.

Because it would be unjust and inequitable, after the great lapse of time since the filing of the verdict in this case, to confirm the same, these proceedings during said period of time having constituted a cloud upon the title to said property and prevented a sale thereof by these exceptants, and these exceptants during said period of time having been forced to pay taxes, insurance, and interest thereon, and said property having greatly increased in value, for which no allowance is made in and by said verdict; and these exceptants allege that the confirmation of said verdict at this time would operate as a taking of their property without just compensation and without due process of law.

Because the verdict of the jury in this case is void, in that it assesses benefits against the property of these exceptants not contemplated by the act of Congress under which these proceedings were instituted and prosecuted.

They except to said verdict in so far as it assesses benefits upon and against *lots 11, 12, and 13, in Wright and Cox's subdivision*, because said assessment of benefits is unreasonable, excessive, and ex*hor*bitant, said lots already having a frontage upon Florida avenue, which is 80 feet wide, and said lots being in nowise benefited by the extension of said Sherman avenue.

7 They except to said verdict in so far as it assesses benefits against *lots 28, 29, 32, 36, and 37*, in said subdivision, because said lots do not abut on said Sherman avenue, and because said assessment is unreasonable, excessive, and unjust.

They except to said verdict in so far as it assesses benefits against lots *20, 21, and 22*, in said subdivision, because said assessment is unreasonable, unjust, and excessive.

They except to said verdict in so far as it assesses benefits against *lots 8, 9, 10, 11, 18, 19, 20, and 21, in block 5, Todd and Brown's subdivision*, because said lots do not abut on said Sherman avenue, said lots 8, 9, 10, and eleven abutting on Harvard street, which is 60 feet wide, and said lots 18, 19, 20, and 21 abutting on Steuben street, which is 60 feet wide, and said lots are in nowise benefited by the extension and widening of said Sherman avenue; and, further, because said assessment of benefits is unreasonable, excessive, and unjust.

They except to said verdict in so far as it assesses benefits upon *lots 12, 13, 14, 15, 16, and 17, block 5*, in said subdivision, because the said assessment of benefits is unreasonable, excessive, and unjust.

They except to so much of said verdict as assesses benefits against *lots 8, 9, 10, 11, 14, and 15, in block 7*, in said subdivision, because said assessment of benefits is unreasonable, excessive, and unjust, said lots 8, 9, 10, and 11 not abutting on said Sherman avenue, but abutting on Wallach street, which is 60 feet wide, and said lots being in nowise benefited by the extension and widening of said Sherman avenue; and they allege that in so far as said verdict assesses benefits against said last-mentioned lots the same is void and against the terms and spirit of the act of Congress under which these proceedings were instituted.

They except to so much of said verdict as assesses benefits against *lots 2 and 3, block 11*, in said subdivision, because said lots do not abut on said Sherman avenue, but abut on Irving street, which is 60 feet wide. They except to the assessment of benefits upon *lot 8*, in said block, because the same is unreasonable, excessive, and unjust, said lot being in nowise benefited by the extension and widening of said Sherman avenue.

They except to so much of said verdict as assesses benefits against *lots 5, 8, and 15, in block 12*, in said subdivision, because said lots 5 and 8 do not abut on said Sherman avenue, but abut on Irving and Bismark streets respectively, which are each 60 feet wide, and said assessment of benefits as to lot 15, in said block, is unjust, unreasonable, and excessive.

They except to so much of said verdict as assesses benefits against *lots 4, 5, 8, 11, 12, 13, and 15, block 13*, in said subdivision, because said lots 4, 5, and 8 do not abut on said Sherman avenue, but abut on Bismark and Princeton streets respectively, which are each 60 feet wide, and said lots are in nowise benefited by the extension and widening of said Sherman avenue, and because said assessment as to lots 11, 12, 13, and 15, in said block, is inconsistent, inequitable, unreasonable, unjust, and excessive.

8 They except to so much of said verdict as assesses benefits against *lots 4, 7, 10, and 11, block 14*, in said subdivision, because said lots 4 and 7 do not abut on said Sherman avenue, but abut on Princeton and Harvard streets respectively, which are each

60 feet wide, and because said assessment of benefits as to lots 10 and 11, in said block, is unreasonable, unjust and excessive.

They except to so much of said verdict as assesses benefits against *lots 1, 4, 6, and 12, in block 15*, in said subdivision, because said lots 4 and 6 do not abut on said Sherman avenue, but abut on Harvard and Steuben streets respectively, which are each 60 feet wide, and because said assessment as to said lots 1 and 12 is unreasonable, unjust, and excessive.

They except to so much of said verdict as assesses benefits against *lots 12 and 13, in block 16*, in said subdivision, because said lots do not abut on said Sherman avenue, but abut on Wallach street, which is 60 feet wide, and said lots are in nowise benefited by the extension and widening of said Sherman avenue.

They except to so much of said verdict as assesses benefits against *lots 5, 17, and 18, in block 17*, in said subdivision, because said lot 5 does not abut on said Sherman avenue, but abuts on Wallach street, which is 60 feet wide, and because said assessment of benefits as to said lots 17 and 18 is unreasonable, unjust, and excessive.

They except to so much of said verdict as assesses benefits against *lots 1, 4, 5, and 13, in block 18*, in said subdivision, because said lots 4 and 5 do not abut on said Sherman avenue, but abut on Marshall street, which is 60 feet wide; and because said assessment of benefits as to lots 1 and 13 is unreasonable, unjust, and excessive; and, further, because said verdict does not allow any damages for the improvements standing upon said lot 13, which said improvements, or a portion of the same, are condemned by these proceedings for the extension and widening of said Sherman avenue.

They except to so much of said verdict as assesses benefits against the *north part of lot 3, in block 19*, in said subdivision, because said assessment of benefits is unreasonable, unjust, and excessive, and because said lot is in nowise benefited by the extension and widening of said Sherman avenue, and these acceptants allege that said lot is damaged greatly in excess of the amount of damages awarded by said verdict as to said lot.

Wherefore, for the reasons hereinbefore stated, these exceptants pray that said verdict, award, and assessment be not confirmed by this honorable court, but that the same be vacated, set aside, and for nothing held.

And these exceptants will ever pray.

SAM'L MADDOX,
Attorney for Jesse Brown and Rosa Wallach.

9 *Motion for Confirmation of Verdict.*

Filed August 3, 1901.

In the Supreme Court of the District of Columbia.

In re EXTENSION AND WIDENING OF SHERMAN AVENUE. District Court, No. 555.

Now come the Commissioners of the District of Columbia, by A. B. Duvall and Arthur H. O'Connor, their attorneys, and move the court that the verdict, award, and assessment of the jury filed herein on the 9th day of May, 1900, be finally confirmed, notwithstanding the exceptions thereto filed herein.

A. B. DUVALL,
ARTHUR H. O'CONNOR,
Attorneys for the D. C.

Take notice that on Wednesday, the 7th day of August, 1901, at 10 o'clock a. m. of the said day, or as soon thereafter as counsel can be heard, we will call up for hearing the foregoing motion before the justice then holding a term of the district court.

A. B. DUVALL,
ARTHUR H. O'CONNOR,
Attorneys for the D. C.

To —— ——, att'y for ——.

Mailed copies of the foregoing motion and notice August 2, 1901, to the following persons: To Downing & Keane, att'ys for Thos. Dunn; Sam. Maddox, att'y for Jesse Brown and Rosa Wallach; Leo Simmons, att'y for Mary F. Isaninger, Agnes V. O'Connor, Caroline Mitinger, Thos. H. G. Todd, and Lorin M. Saunders; Strasburger & Damman, att'ys for Henry Strasburger; Edwin Forrest, att'y for Mary M. Cross; Barnard & Johnson, att'ys for Wm. Gass and Thomas Keliher; Wolf & Rosenberg, att'ys for John W. Schaefer and Salm Behrend; Mackal & Maedel, att'y for John Finn; Birney & Woodward, att'ys for Geo. W. F. Swartzell, trustee.

ARTHUR H. O'CONNOR,
Ass't Att'y, D. C.

Order Confirming Verdict.

Filed October 2, 1901.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re EXTENSION OF SHERMAN AVENUE. No. 555, District Court.

It appearing to the court that the order *nisi* confirming the verdict, award, and assessment of the jury filed herein has been
10 duly published as therein provided, and that the owners of the lands condemned and the owners of the lands assessed in

said verdict have been duly notified of the pendency of these proceedings, as provided in said order, and argument of counsel upon the exceptions to said verdict filed therein having been heard and considered, it is by the court, this 2nd day of October, 1901, upon motion of the Commissioners of the District of Columbia, adjudged, ordered, and decreed that the land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with a uniform width of one hundred feet, as described in this proceeding and shown on the plat filed herein, be, and the same is hereby, condemned, and that the said exceptions and each of them be, and they are hereby, overruled, and that the aforesaid verdict, award, and assessment, as amended by an order passed herein on the 3 day of August, 1901, and by an order passed herein this day be, and the same hereby is, in all respects finally ratified and confirmed.

T. H. ANDERSON, *Justice.*

Appeal of Jesse Brown & Rosa Wallach.

Filed October 23, 1901.

In re EXTENSION OF SHERMAN AVENUE. District Court, No. 555, Docket 2.

And now come Jesse Brown and Rosa Wallach, owners of certain property involved in these proceedings, and appeal to the Court of Appeals from the order passed herein on the 2nd day of October, A. D. 1901, overruling their exceptions to the verdict and award of the jury heretofore filed in this cause and affirming said verdict and award.

ROSA WALLACH,
JESSE BROWN,
By SAML MADDOX,
Their Attorney.

Memorandum.

October 24, 1901.—Appeal bond filed.

Order of Severance.

Filed November 1, 1901.

In the Supreme Court of the District of Columbia, Holding a District Court.

In the Matter of THE EXTENSION AND WIDENING OF SHERMAN AVENUE. No. 555, District Court.

This cause coming on for hearing on motion of Jesse Brown and Rosa Wallach for an order of severance authorizing them to prosecute the appeal by them heretofore noted in this cause, it is,
11 this 1st day of November, A. D. 1901, ordered that said Jesse Brown and Rosa Wallach be, and they are hereby, authorized to

prosecute their said appeal without regard to other persons interested in these proceedings.

T. H. ANDERSON, *Justice.*

Instructions to Clerk for Preparation of Record.

Filed November 4, 1901.

In the Supreme Court of the District of Columbia.

In re THE WIDENING OF SHERMAN AVENUE. District Court, No. 555.

To the Clerk:

In preparing the record for appeal of Rosa Wallach and Jesse Brown from the order passed in this cause on the 2nd day of October, A. D. 1901, please include therein the following, and no other, memoranda of the proceedings:

Petition, filed May 31, 1899.

Rule citing interested parties, Sept. 6, 1899.

Verdict of jury, filed May 9, 1901, and all entries in schedules accompanying verdict referring to lots belonging to appellants, as follows:

Part of lot 3, block 19;
Lots 1 and 13, block 18;
Lots 17 and 18, block 17;
Lots 1 and 12, block 15;
Lots 10 and 11, block 14;
Lot 13, block 13;
Lot 15, block 12;
Lot 8, block 11;
Lots 14 and 15, block 7;
Lots 12, 13, 14, 15, and 17, block 5.
All of Todd & Brown's subdivision.
And also lots 11, 12, 13, 20, 21, and 22 of Wright & Cox's subdivision.

Exceptions of Wallach and Brown, July 22, '01.

Motion for confirmation of verdict.

Order confirming verdict, Oct. 2, 1901.

Appeal of Brown and Wallach, Oct. 22, '01.

Mem.—Bond of appellants, Oct. 24.

Order of severance, Nov. 1, 1901.

I enclose herewith a map to be incorporated in the record.

Very truly yours,

SAML MADDOX,
Attorney for Rosa Wallach and Jesse Brown.

12 UNITED STATES OF AMERICA, } *ss:*
District of Columbia, }

Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 20, inclusive, to be a true and correct transcript of the record, as

per directions of counsel herein filed, copy of which is made part of this record, in cause No. 555, district court, *In re* extension of Sherman avenue, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 19th day of November, A. D. 1901.

JOHN R. YOUNG, *Clerk.*

(Here follows plat marked p. 13.)

Endorsed on cover: District of Columbia supreme court. No. 1142. Jesse Brown *et al.*, appellants, *vs.* Henry B. F. Macfarland *et al.*, Comm'rs. D. C. Court of Appeals, District of Columbia. Filed Nov. 25, 1901. Robert Willett, clerk.

14 TUESDAY, *December 10th, A. D.* 1901.

JESSE BROWN and ROSA WALLACH, Appellants,
vs.
JOHN B. WIGHT, JOHN W. ROSS, and LANSING H. BEACH, Commissioners of the District of Columbia. } No. 1142.

The expiration of the term of office of John B. Wight and Lansing H. Beach appellees herein, and the appointment of Henry B. F. Macfarland and John Biddle their successors as Commissioners of the District of Columbia having been suggested, it is upon motion of Mr. A. B. Duvall, of counsel for the appellees, now here ordered by the court that the said Henry B. F. Macfarland and John Biddle, Commissioners of the District of Columbia be, and they are hereby, made parties appellees in this cause.

15 *Addition to Record per Stipulation of Counsel.*

Court of Appeals of the District of Columbia, January Term, 1902.

JESSE BROWN and ROSA WALLACH, Appellants,
vs.
HENRY B. F. MACFARLAND, JOHN W. ROSS, and JOHN Biddle, Commissioners of the District of Columbia. } No. 1142.

Filed December 31, 1901.

Court of Appeals, District of Columbia, January Term, 1902.

JESSE BROWN and ROSA WALLACH, Appellants,
vs.
HENRY B. F. MACFARLAND ET AL., Commissioners, D. C. } No. 1142.

It is hereby stipulated between the parties to this appeal that such entries in Schedule H, attached to the verdict of the jury, as determine assessments for benefits charged against the several lots and parcels of land mentioned in the proceedings and belonging to the

10TH. ST.
AVENUE
9TH. ST.
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215.33
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60
60

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1178'
1264.97'
1851.94'
1766.75'
1873.76'
2134.66'
2221.65'
2305.62'
2395.56'
2482.56'
2569.53'
2656.5'
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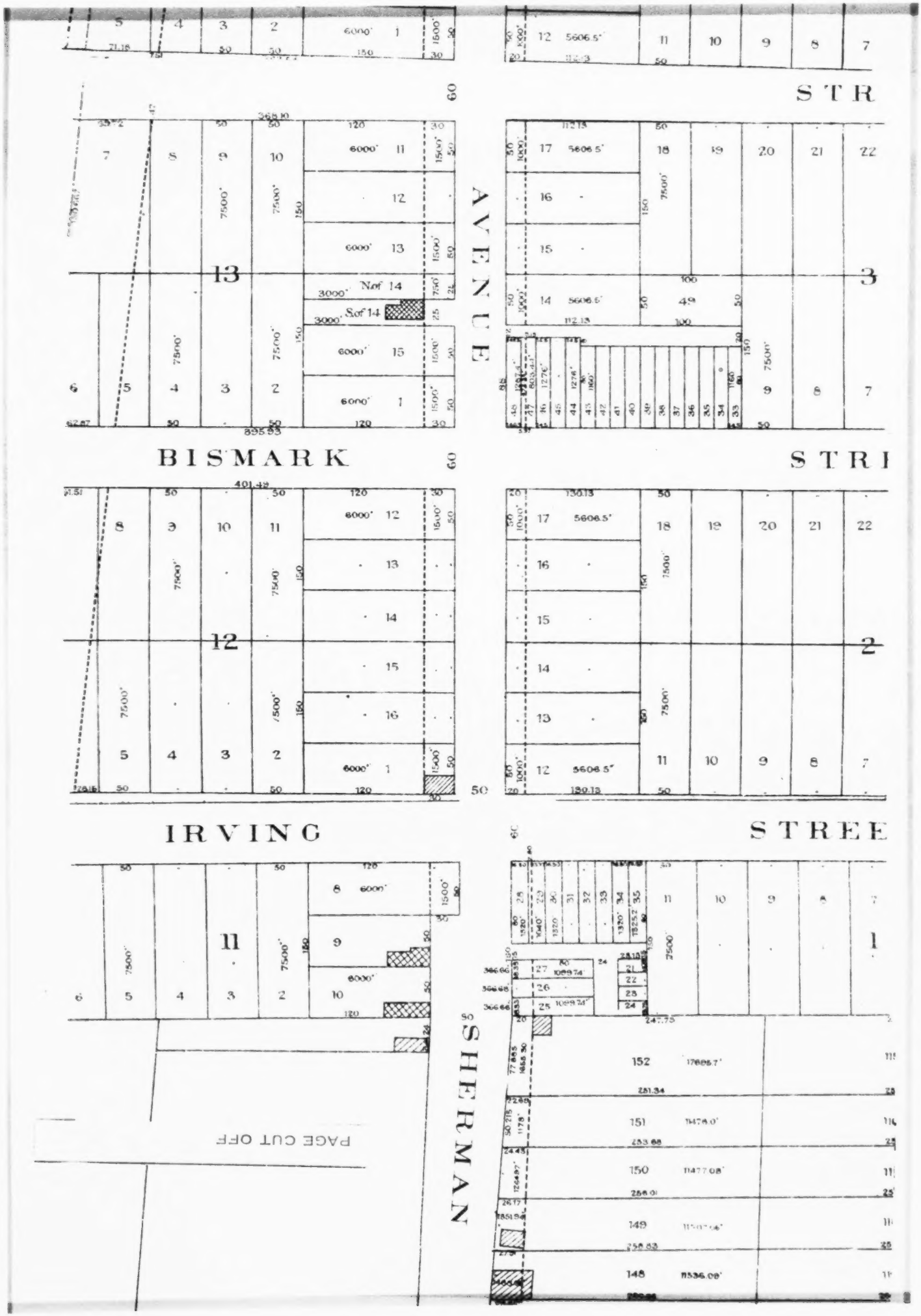
3750'
2700'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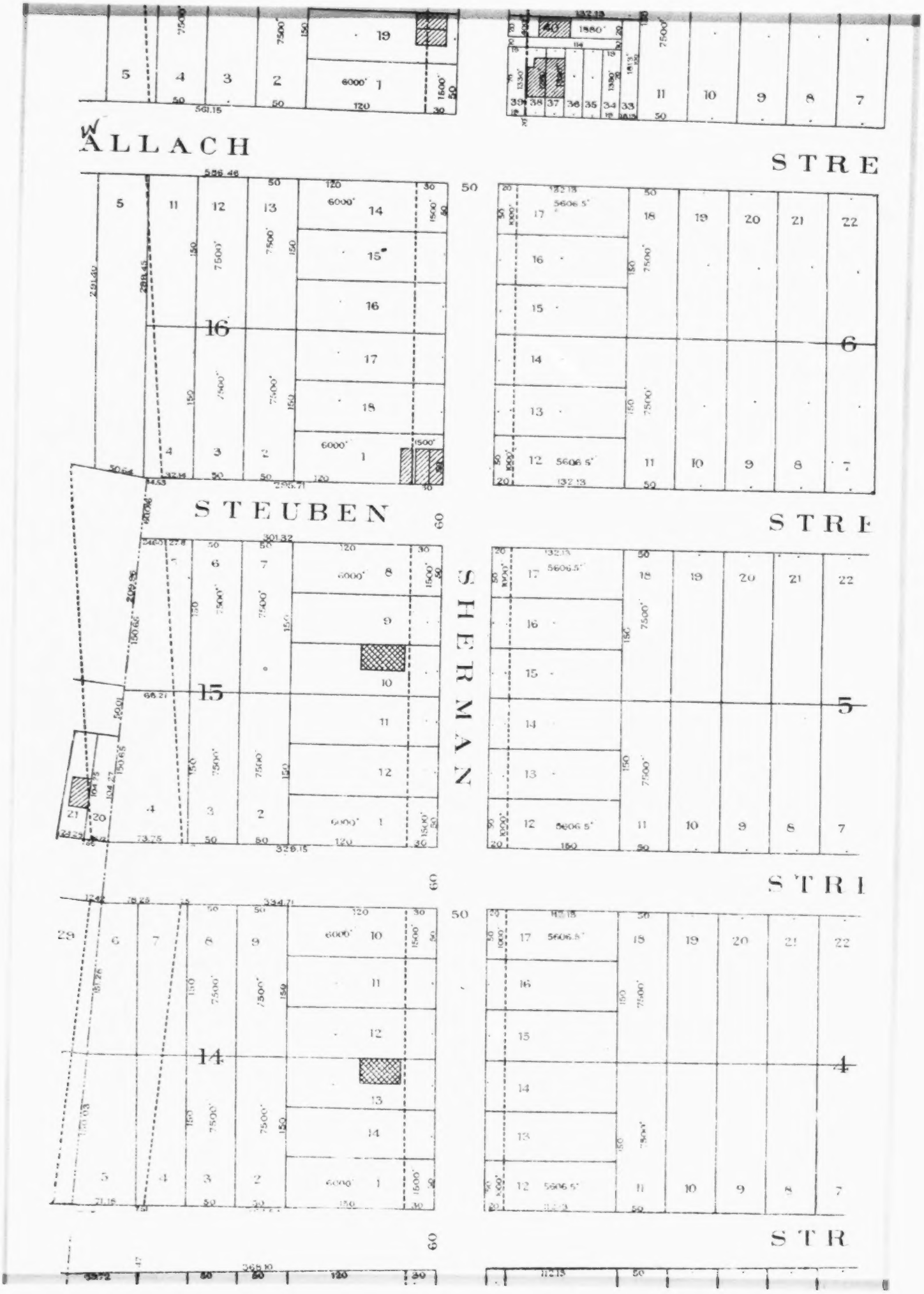
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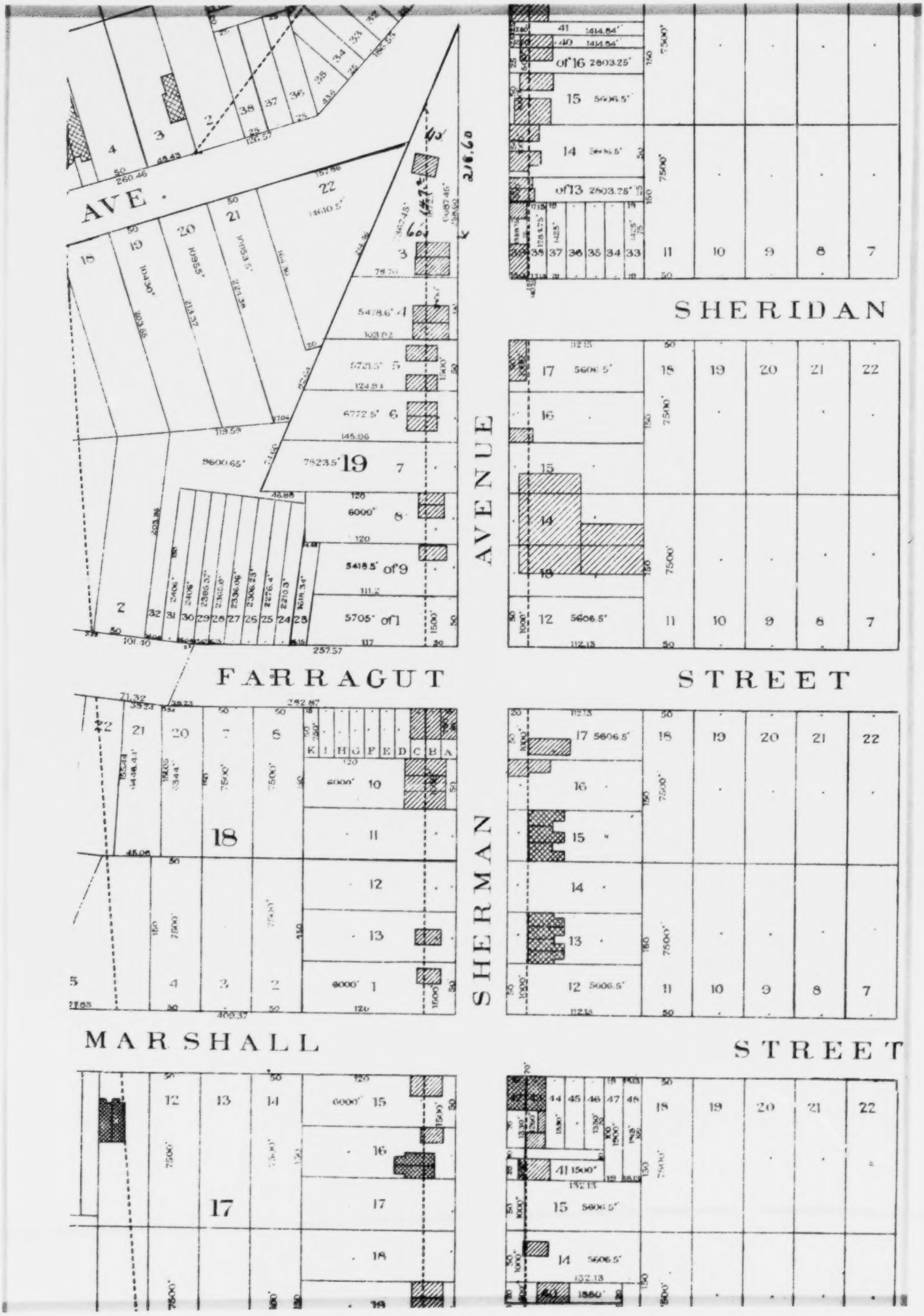
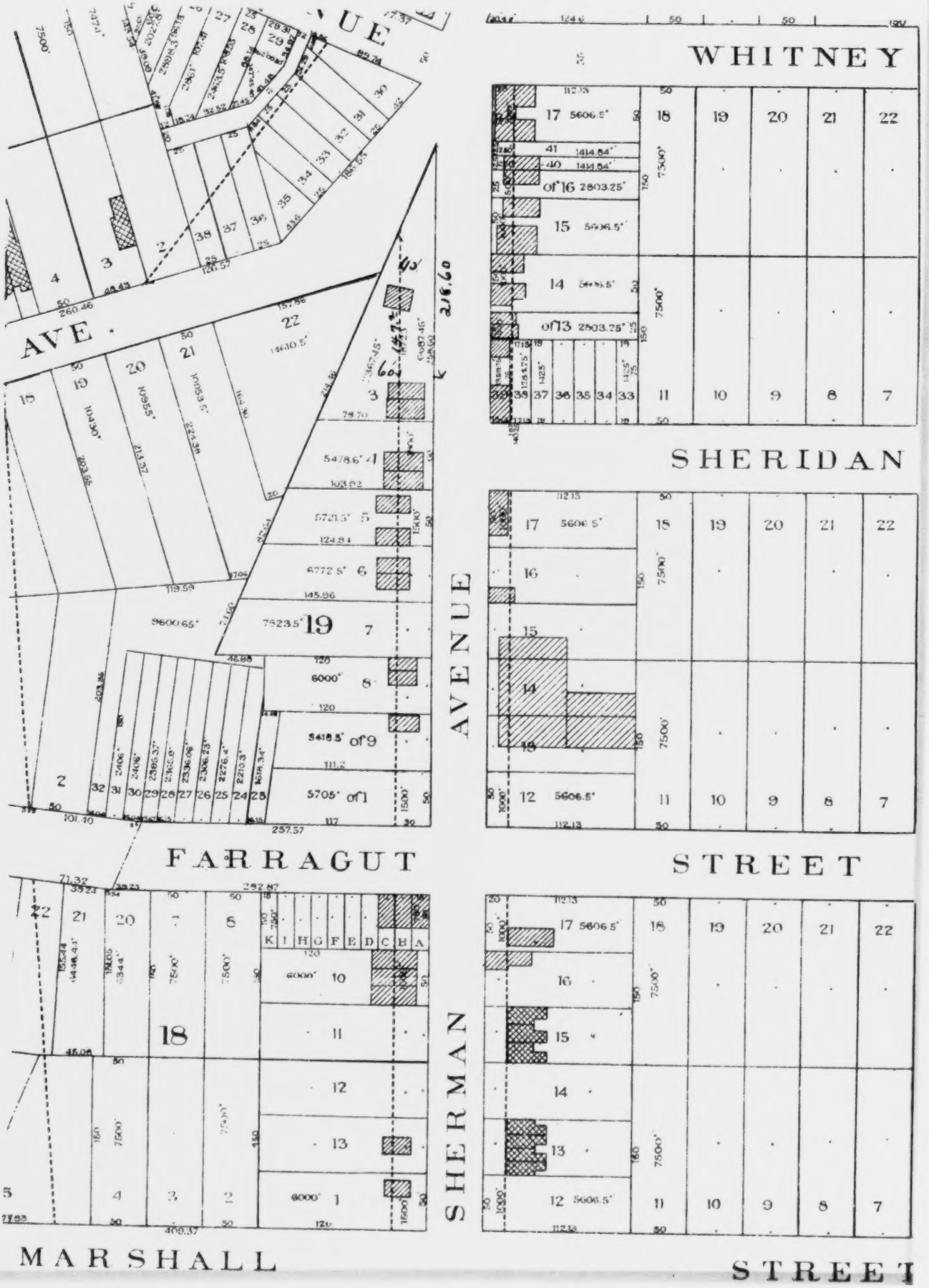

AVE.
AVENUE
SHERMAN
SHERIDAN
FARRAGUT
STREET
MARSHALL
STREET

No. 1142
Brown et al
v
Mayer et al
} p. 22.

No. 351
Dist. Ct.
of
Brown
} p. 13



appellants shall be printed, and be taken and considered a part of the record in this cause, and either party to the appeal is at liberty to produce at the hearing the original verdict, assessment, and award filed in the cause.

SAM'L MADDOX,
Attorney for Appellants.
A. B. DUVALL,
For Appellees.

16 SCHEDULE No. 2.

Block.	Lot.	Area.	Assessment.	Owners.
*	*	*	*	*
19	Of 3 N., 218.6	4,555	$3,410.00	Rosa Wallach & Jesse Brown.
*	*	*	*	*
18	Of 1	6,000	$650.00	" " "
*	*	*	*	*
18	Of 13	6,000	$500.00	Rosa Wallach & Jesse Brown.
*	*	*	*	*
17	Of 17	6,000	$500.00	Rosa Wallach & Jesse Brown.
"	Of 18	6,000	$500.00	" " "
*	*	*	*	*
15	Of 1	6,000	$650.00	R. Wallach & J. Brown.
*	*	*	*	*
15	Of 12	6,000	$500.00	R. Wallach & J. Brown.
*	*	*	*	*
14	Of 10	6,000	$650.00	Rose Wallach & J. Brown.
	Of 11	6,000	$500.00	" " "
*	*	*	*	*
13	13	6,000	$500.00	Rosa Wallach & Jesse Brown.
*	*	*	*	*
12	Of 15	6,000	$500.00	Rosa Wallach & Jesse Brown.
*	*	*	*	*
11	Of 8	6,000	$550.00	Rosa Wallach & Jesse Brown.
*	*	*	*	*
7	Of 14	5,606	$400.00	Rosa Wallach & Jesse Brown.
	Of 15	5,606	$400.00	" " "

Todd and Brown's subdivision.

*	*	*	*	*
5	Of 12	5,606	$425.00	Rosa Wallach & Jesse Brown.
	Of 13	5,606	$360.00	" " "
	Of 14	5,606	$360.00	" " "
	Of 15	5,606	$360.00	" " "
*	*	*	*	*
5	Of 17	5,606	$425.00	Rosa Wallach & Jesse Brown.

Todd and Brown's subdivision.

*	*	*	*	*
	Of 11	4,047.6	$100.00	Rosa Wallach & Jesse Brown.
	Of 12	3,849.4	$200.00	
	Of 13	3,651.3	$350.00	
*	*	*	*	*
	Of 21	4,300	$1.00	Rosa Wallach & Jesse Brown.
	Of 22	4,385	$500.00	" " "

Wright and Cox subdivision.

17 Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing is a true copy from Schedule H, attached to the verdict of the jury in case of the extension and widening of Sherman avenue, No. 555, district court, in so far as it relates to the property of the appellants.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 31st day of December, A. D. 1901.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: No. 1142. Jesse Brown *et al.*, appellants, *vs.* Henry B. F. Macfarland *et al.*, Comm'rs, D. C. Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Dec. 31, 1901. Robert Willett, clerk.

18 THURSDAY, *March 6th, A. D.* 1902.

JESSE BROWN and ROSA WALLACH, Appellants,
vs.
HENRY B. F. MACFARLAND, JOHN W. ROSS, and JOHN Biddle, Commissioners of the District of Columbia. } No. 1142.

The argument in the above-entitled cause was commenced by Mr. Samuel Maddox, attorney for the appellants, and was continued by Messrs. A. H. O'Connor and A. B. Duvall, attorneys for the appellees, and was concluded by Mr. Samuel Maddox attorney for the appellants.

19 JESSE BROWN and ROSS WALLACH, Appellants,
vs.
HENRY B. F. MACFARLAND, JOHN W. ROSS, and JOHN Biddle, Commissioners of the District of Columbia. } No. 1142.

Opinion.

Mr. Chief Justice ALVEY delivered the opinion of the court:

This is an appeal brought into this court from a special term of the supreme court of the District of Columbia, sitting as a District court, in a matter of a proceeding instituted therein by the Commissioners of said District of Columbia, to obtain condemnation of land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue, with the uniform width of 100 feet.

This extension and widening of Sherman avenue are authorized by section 5 of the act of Congress of March 3, 1899. The section of the act just referred to, after conferring authority upon the Commissioners of the District to institute proceedings for condemnation of lands for extending and widening the avenue, then provides:

"That of the amount found due and awarded for damages for and

in respect of the land condemned under this act for the extension and widening of said Sherman avenue not less than one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting on both sides of Sherman avenue, and the extension thereof as herein provided, to a distance of three hundred feet from the building lines on the east and west sides of Sherman avenue as widened and extended: *Provided*, That no assessment shall be made against those pieces or parcels of ground out of which land has already been dedicated to the District of Columbia for the purpose of widening Sherman avenue as herein provided for."

The act contains no special or express provision in any of its own sections prescribing the mode and form of conducting the procedure for procuring the condemnation of the land required; but, instead thereof, by the ninth section of the act, it is provided, "That the proceedings for the condemnation of the lands as provided for in this act shall be under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, which provides for the condemnation of lands in said District for public highways."

This general reference to and making the provisions of chapter eleven of the Revised Statutes applicable to proceedings under the act of 1899, makes it necessary that we examine the sections of the Revised Statutes that apply to and prescribe the mere mode of procedure for the condemnation of land.

By section 257, of chapter 11 of the Revised Statutes, it is provided, that whenever the amount of damages for the land required for a highway cannot be agreed upon, "the proper authorities shall direct the marshal of the District to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and appear on the premises on a day specified, to assess the damages, if any, which each owner of land through which the road is to pass may sustain by reason thereof."

Section 260 provides that the marshal shall summon the jury, and administer the oath to them, that they will, etc., decide what damages, if any, each owner may sustain by reason of running the road through his premises.

Section 262 provides, that the jury, having been upon the premises and assessed the damages, "shall make out a written verdict, to be signed by them, or a majority of them, and attested by the marshal, which shall be transmitted to the proper authorities, and which shall be recorded."

Section 263 provides that, "If the proper authorities or any owner of the lands are *dissatisfied with the verdict thus rendered*, and no arrangement being made between them, the marshal *shall be ordered* to summon a second jury of twelve judicious, disinterested men, not related to any one interested, to meet and view the premises, giving the parties interested at least ten days' notice of the time and place of meeting. And the marshal and jury shall proceed as before directed in regard to the first jury." And this latter verdict is declared, by section 264, to be final and conclusive.

Section 265 provides, that "In all cases where it becomes necessary to summon a second jury to assess damages, if the amount assessed by the second jury shall not be greater than the amount assessed by the first, the costs of the second jury shall be paid by the parties objecting to the first verdict; but if greater, they shall be paid by the District. All expenses up to the second jury shall be paid by the District."

These several sections and provisions of chapter 11 of the Revised Statutes must be construed as modified by and be made to harmonize with the provisions of the act of March 3, 1899, so far as the mode of procedure is concerned; that is to say, as to the manner of summoning and organizing the juries, the making up and returning of their verdicts, the rejection of the first verdict, and the summoning and proceeding of the second jury, and the final and conclusive effect of their verdict. The rejection of the verdict of the first jury of seven, upon dissatisfaction expressed by either of the parties concerned, appears to be in the nature of an appeal from the decision of the jury of seven to a jury of twelve.

Acting under the provisions of the Revised Statutes referred to, the marshal was directed to summon a jury of seven, who viewed the lands that were intended to be condemned, heard and considered the testimony of witnesses, and rendered their verdict, which was filed May 9, 1900, whereby damages were awarded for the lands condemned, and assessments were made, to the extent of one-half of the damages, as and for benefits to the abutting or adjacent lands. This verdict remained in court without action thereon until July 22, 1901, when the appellants, being owners of several pieces or parcels of land embraced in the verdict, filed exceptions to the verdict making the award of damages and the assessment of benefits; though they did not in terms pray for a jury of twelve to be summoned, but they did pray that the verdict be set aside and vacated. The exceptions thus filed were overruled by the court, and the verdict of the jury of seven was accepted and confirmed. After the exceptions were filed and before the action of the court thereon, the Commissioners, the present appellees, by motion, prayed the court that the verdict of the jury should be finally confirmed, notwithstanding the exceptions thereto filed, and it was accordingly confirmed on October 2, 1901, and it is from that order that this appeal is taken.

The record contains no evidence of the actings and doings of the jury of seven other than that furnished by the verdict itself. There was no evidence produced in the court below, and of course there is none produced here. The matters of valuation and award of damages, nor that of assessments for benefits, cannot, therefore, be the subjects of review by this court. The statute, manifestly, does not contemplate that such review should be had by the court, as there is no provision made for the production of evidence to the court, and it is expressly provided that the verdict of the second jury or jury of twelve *shall be final and conclusive*. The only question, therefore, on this appeal is one of law, and that is, whether the exceptions to the verdict of seven should have been taken and treated

by the court as an expression of dissatisfaction with the verdict by the exceptants, and thereupon making it incumbent upon the proper authorities, if they desire to proceed with the work of condemnation, to order the marshal to summon a jury of twelve, as directed by the statute.

It is contended for the appellants that upon making their dissatisfaction with the verdict known, by filing their exceptions, that it was their absolute and unqualified right, if the proper authorities intended to prosecute the proceeding for condemnation and assessment, that a jury of twelve should have been ordered to be summoned as directed by the statute; and that it was wholly incompetent to the court to disregard the exceptions and dissatisfaction of the appellants and proceed to accept and confirm the verdict of a majority of the jury of seven. On the other hand, it is insisted by the appellees, the Commissioners of the District, that, upon the proper construction of the act of March 3, 1899, in connection with the sections 257, 260, 261, 262, 263 and 264 of chapter 11 of the Revised Statutes relating to the District of Columbia, it was neither the duty of the court, or of the proper authorities prosecuting the proceeding, to order, upon the expression of dissatisfaction of the owners of property with the first verdict, the summoning of a second jury to consist of twelve, whose verdict is declared to be final and conclusive. In this contention, however, we cannot concur. To support such contention, we should be required to disregard the express mandate of the statute.

Section 9, of the act of March 3, 1899, is explicit in declaring that the proceedings for the condemnation of the lands as provided for in that act, "*shall be under and according to the provisions* of chapter eleven of the Revised Statutes relating to this District." This provision of the act of 1899 only has reference, as we have before stated, to the manner of proceeding in organizing the agency or tribunal for the condemning the lands, awarding the damages, and making the assessments; but not as to the *manner* of awarding damages and levying assessments for benefits; that being directed by section 5 of the act of 1899. If the sections of chapter 11 of the Revised Statutes, in respect to the mode of procedure in organizing the juries and declaring the effect of their verdicts, are not given effect, there would be a serious defect in the statute authorizing this proceeding for the extension of Sherman avenue; for the act of March 3, 1899, fails to make any other provision as to the mode of organizing the juries for awarding damages and making assessments, than the general reference to and adoption of the mode of procedure as contained in the several sections of chapter 11 of the Revised Statutes referred to, by section 9 of the act of 1899.

It is urged that the appellants did not, in terms, demand that the second jury of twelve should be ordered, and therefore the court was justified in ratifying the verdict of seven. But it must be borne in mind that it was not the duty of the appellants, as owners of lands proposed to be condemned, to demand a summoning of a second jury. The statute does not require it of them. That is the duty of the authorities authorized to institute and prosecute the proceedings

of condemnation to completion. The owners of the lands proposed to be condemned are placed in the position of defendants or opponents of the proceeding of condemnation; and, consequently, all affirmative acts prescribed by the statute in perfecting the proceeding, must be shown to have been complied with by the parties authorized to take and prosecute the proceeding. The whole proceeding is strictly statutory, and it must be affirmatively shown
21 that all the provisions of the statutes that apply to the proceedings have been substantially complied with. Otherwise the whole proceeding would be void and without effect.

The provisions of chapter 11 of the Revised Statutes relating to the District of Columbia, have been applied in several cases of condemnation, where they have been referred to for the mode of procedure as in the present instance. These instances are referred to, in the opinion of the Supreme Court of the United States, in the case of Bauman *v.* Ross, 167 U. S. 572, 573; and in that case, the court, in referring to the course of proceeding in case of dissatisfaction by the court or any of the land-owners, with the verdict of seven, said, "that the matter might be submitted to a jury of twelve, proceeding as before, the verdict of whom, or of a majority of whom, was final."

Without further remark upon the proceedings of the court below, we are of opinion that there was error in confirming the verdict of seven, notwithstanding the exceptions filed thereto, and that the order appealed from must be reversed, and the case remanded, that proceeding may be taken and a jury of twelve ordered, as directed by the statute. *Order reversed.*

22 TUESDAY, *April 1st, A. D.* 1902.

JESSE BROWN and ROSA WALLACH, Appellants,
vs.
HENRY B. F. MACFARLAND, JOHN W. ROSS, and John Biddle, Commissioners of the District of Columbia.
No. 1142, April Term, 1902.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the order of the said supreme court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said supreme court, that proceeding may be taken and a jury of twelve ordered, as directed by the statute.

Per MR. CHIEF JUSTICE ALVEY.

April 1, 1902.

WEDNESDAY, *April 16th, A. D.* 1902.

JESSE BROWN and ROSA WALLACH, Appellants,
vs.
HENRY B. F. MACFARLAND, JOHN W. ROSS, and JOHN Biddle, Commissioners of the District of Columbia. } No. 1142.

On motion of Mr. A. B. Duvall of counsel for the appellees, in the above-entitled cause, it is by the court ordered that said appellees be allowed an appeal to the Supreme Court of the United States.

23 UNITED STATES OF AMERICA, *ss:*

To Jesse Brown and Rosa Wallach, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Henry B. F. Macfarland, John W. Ross and John Biddle, Commissioners of the District of Columbia, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 16th day of April, in the year of our Lord one thousand nine hundred and two.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted April 28, 1902.
SAM'L MADDOX.

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 28, 1902. Robert Willett, clerk.

24 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 23 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Jesse Brown and Rosa Wallach appellants *vs.* Henry B. F. Macfarland, John W. Ross and John Biddle, Commissioners of the District of Columbia No. 1142, April term, 1902, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 30th day of April A. D. 1902.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,540. District of Columbia Court of Appeals. Term No. 331. Henry B. F. Macfarland, John W. Ross, and John Biddle, Commissioners of the District of Columbia, appellants, *vs.* Jesse Brown and Rosa Wallach. Filed May 21", 1902.

No. 604.

Motion to advance.

Office Supreme Court U.S.
FILED
MAY 28 1902
JAMES H. McKENNEY,
Clerk.

Filed May 28, 1902.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

HENRY B. F. MACFARLAND ET AL.,
APPELLANTS,
vs.
JESSE BROWN AND ROSA WALLACH.

MOTION TO ADVANCE.

IN THE

Supreme Court of the United States.

HENRY B. F. MACFARLAND ET AL.,
APPELLANTS,
vs.
JESSE BROWN AND ROSA WALLACH.

MOTION TO ADVANCE.

The appeal in the above-entitled case is from a decree of the Court of Appeals of the District of Columbia, involving the construction of the act of Congress approved March 3, 1899, for the extension and widening of Sherman avenue, in the District of Columbia.

This act of Congress is in terms identical with the act for the extension of S, Twenty-second, and Decatur streets, which this Honorable Court reviewed in the case of Wight vs. Davidson et al., reversing the Court of Appeals, and while the question now sought to be reviewed in this case was not determined by this Honorable Court, the effect of the present decision of the Court of Appeals seriously interferes with the practical operation of said act of Congress, and unsettles all the proceedings taken for the extension of highways in the District of Columbia under the several acts of Congress for 1899, and the several hundred assessments for benefits made under said acts of Congress. These assess-

ments are part of the revenue of the District of Columbia; they involve several hundred thousands of dollars, and the action of the Court of Appeals has clouded the right of recovery, and thus materially interfered with the collection of said assessments. The case presents a question of great public importance, which ought to be determined at as early a day as this Honorable Court may find it convenient to hear the case.

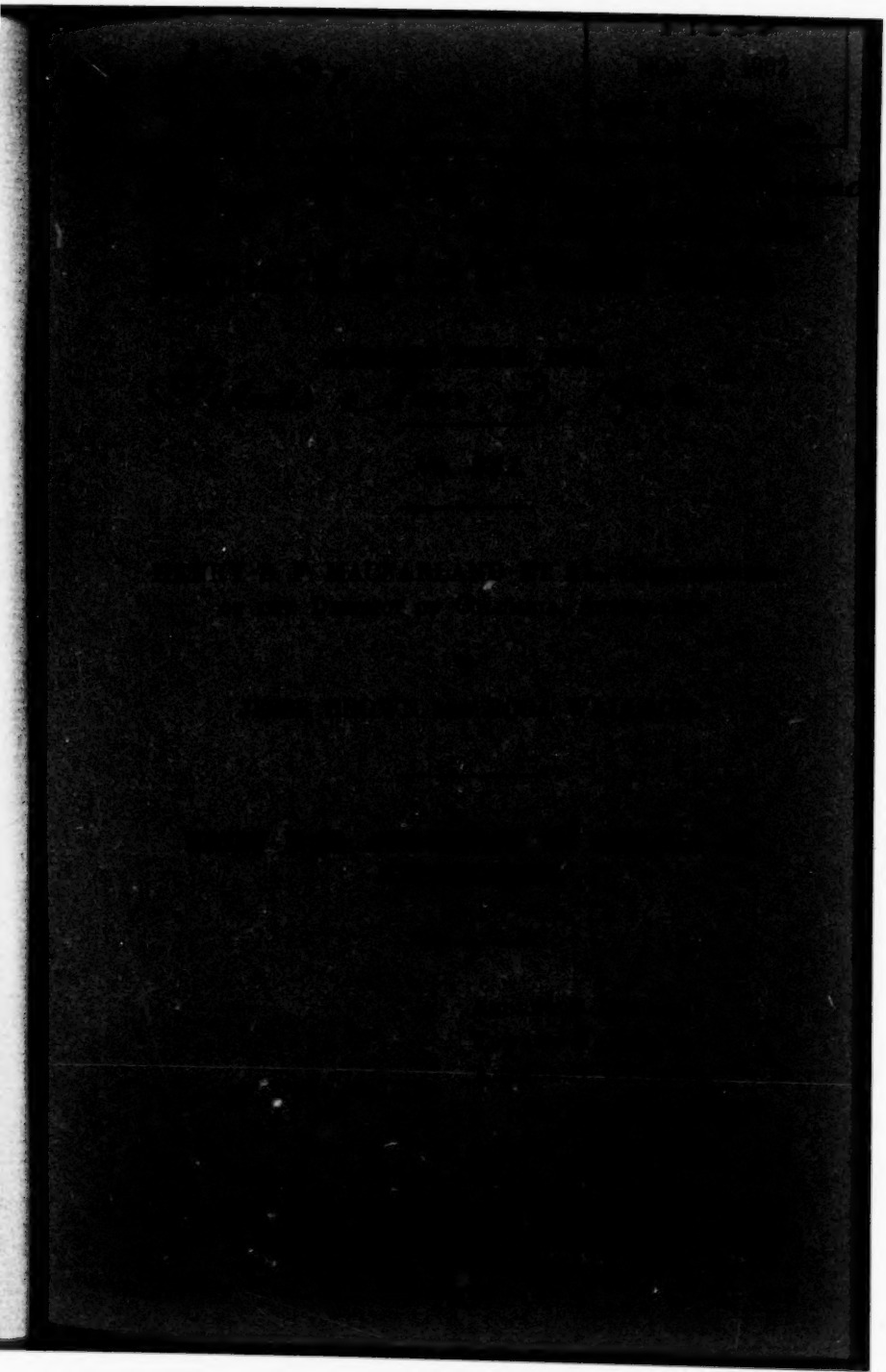
In consideration of the premises, the appellants respectfully pray that the case may be advanced for hearing at the opening of the next term of this Honorable Court. All of which is respectfully submitted.

ANDREW B. DUVALL,
Attorney for Appellants.

I agree with the motion to advance.

(Signed) Sam'l. Maddox,

Attorney for Appellees.



Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 331.

HENRY B. F. MACFARLAND ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLANTS,

vs.

JESSE BROWN AND ROSA WALLACH.

BRIEF AND ARGUMENT IN BEHALF OF APPELLANTS.

STATEMENT OF FACTS.

Under the act of Congress entitled "An act for the extension of Pennsylvania avenue southeast, and for other purposes," approved March 3, 1899 (30 Stat., p. 1381), the Commissioners of the District of Columbia were by the terms of section 5 of said act "authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a district court, a proceeding to condemn the land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet." The provisions of said section 5 are as follows:

"SEC. 5. That within ninety days after the approval of this act the Commissioners of the District of Columbia be,

and they are hereby, authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a district court, a proceeding to condemn the land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet.

"That of the amount found due and awarded for damages for and in respect of the land condemned under this act for the extension and widening of said Sherman avenue not less than one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting on both sides of Sherman avenue, and the extension thereof as herein provided, to a distance of three hundred feet from the building lines on the east and west sides of Sherman avenue as widened and extended: *Provided*, That no assessment shall be made against those pieces or parcels of ground out of which land has already been dedicated to the District of Columbia for the purpose of widening Sherman avenue as herein provided for."

Under the authority thereby conferred a petition was filed by the Commissioners of the District of Columbia in the supreme court of the District of Columbia, sitting as a district court, upon the 31st day of May, 1899, being No. 555 on the District court docket, praying that the court direct the marshal of the District of Columbia to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and appear on the premises on a day specified, to assess the damages, if any, which each owner of land through which Sherman avenue is proposed to be extended and widened, as aforesaid, may sustain by reason thereof, and that such other and further orders might be made and proceedings had as were contemplated by said act of Congress and by chapter XI of the Revised Statutes of the United States relating to the District of Columbia, to the end that a permanent right of way for the public over the said lands might be obtained and secured for the aforesaid extension and widening of Sherman avenue (R., p. 1).

Upon this petition the said court on the 16th day of September, 1899, passed an order requiring interested parties to appear in said court on or before the 2d day of October, 1899, and show cause why the prayer of said petition should not be granted, and why the proceedings directed in said act of Congress should not be taken. Pursuant to such order, the jury was summoned and impaneled by the marshal, and upon the 7th day of February, 1900, were sworn according to law, and thereafter the said jury proceeded according to the provisions of chapter XI of the Revised Statutes of the United States relating to the District of Columbia, and having been upon the premises, in accordance with said statute, on the 1st day of May, A. D. 1900, made out their written verdict, which was signed by a majority of the said jurors. Upon the 9th day of May, 1900, the same was filed in the said court under the act of March 3, 1899.

After said verdict was rendered, and before any action was taken thereon by the court, the case of Davidson *et al. vs.* Wight *et al.* came before the Court of Appeals, and, upon the authority of the decision of this court in the case of Norwood *vs.* Baker, the act of March 3, 1899, providing for the extension of S, 22d, and Decatur streets was declared unconstitutional. The act under which Sherman avenue was extended involved the same question, and therefore, pending an appeal of the Davidson case, no action was taken by the trial court in this and other cases involving the same question. In May, 1901, this court, in the case of Wight *et al. vs.* Davidson *et al.* (181 U. S., 371), decided that the act of March 3, 1899, was constitutional, and distinguished its provisions from the Norwood *vs.* Baker case.

Thereafter, on the 3d day of July, 1901, the trial court passed an order *nisi* confirming said verdict and requiring all parties to appear and show cause on or before July 22 why such verdict should not be finally confirmed by the

court. Upon July 22, 1901, the appellees, in response to said order, filed their exceptions to said verdict (R., p. 6).

The court, having heard arguments upon the said exceptions, on October 2, 1901, passed an order overruling the said exceptions and finally ratifying and confirming in all respects the said verdict (R., p. 9).

This was a final judgment and determination of the case, and the appellees appealed the case to the Court of Appeals. The Court of Appeals reversed the trial court, from which decision the Commissioners of the District of Columbia have appealed.

ASSIGNMENT OF ERROR.

The court erred in holding:

1. That the provisions of section 263, Revised Statutes relating to the District of Columbia, providing for a second jury, apply to this proceeding.

2. That appellees had taken the necessary steps to avail themselves of the provisions of said section 263.

3. That the trial court was in error in confirming the verdict of the jury notwithstanding the exceptions thereto.

4. That it was the duty of the Commissioners, and not the duty of the parties claiming to have been dissatisfied with the verdict, to demand a jury of twelve, if a right to such jury exists.

ARGUMENT.

In a series of acts passed in 1899 Congress inaugurated a system of street extensions embracing in three acts the extension of twelve streets. An act entitled "An act to extend S, Decatur, and 22d streets and for other purposes" (30 Stats., 1381) provided for four streets.

An act entitled "An act for the extension of Pennsylvania avenue southeast and for other purposes" (30 Stats., 1344) provided for the extension of seven streets, and an act entitled "An act for the extension of Rhode Island avenue" provided for the twelfth. All of these acts provided, as in the act now before this court, for the assessment of an amount for benefits equal to one-half of the amount awarded for damages.

After the decision of the Court of Appeals in the case of Wight *vs.* Davidson, 16 App. D. C., 371, when the acts above mentioned were deemed unconstitutional by virtue of that decision, a new series of acts was passed not requiring arbitrarily the assessment of one-half the amount for damages, but continuing the same policy by the provision that if the assessments by the jury for benefits did not amount in the aggregate to one-half the sum awarded for damages the Commissioners of the District of Columbia might reject the verdict and annul the proceedings.

Sections 1 to 8, inclusive, of the act of March 3, 1899, entitled "An act for the extension of Pennsylvania avenue southeast and for other purposes," provide for the institution of proceedings for the condemnation of land for divers streets.

In each case it is provided that the Commissioners of the District of Columbia should institute by a petition in the supreme court of the District of Columbia the proceeding for condemnation, section 5 providing for this proceeding.

Sections 9 to 12, inclusive, and section 14 contain the provisions common to all of the proceedings under that act of Congress.

Those sections are as follows:

"SEC. 9. That the proceedings for the condemnation of the lands as provided for in this act shall be under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia,

which provide for the condemnation of lands in said District for public highways; and to provide the necessary funds for the cost of such condemnation proceedings the sum of three thousand five hundred dollars is hereby appropriated out of the funds of the District of Columbia: *Provided*, That each juror shall receive a compensation of five dollars per day for his services during the time he shall be actually engaged in such services under the provisions of this act: *And provided further*, That no appeal by any interested party from any decision of the supreme court of the District of Columbia confirming said assessment or assessments shall delay or prevent the payment of said awards in respect to the property condemned.

"SEC. 10. That payment of the sum or sums of money adjudged to be due and payable for lands taken under the provisions of this act shall be made by the Treasurer of the United States, *ex officio* commissioner of the sinking fund of the District of Columbia, upon the warrant of the said Commissioners, out of the revenues of the District of Columbia; and a sufficient sum to pay such judgments and awards is hereby appropriated out of the revenues of the District of Columbia.

"SEC. 11. That the sums to be assessed against each lot and piece and parcel of ground shall be determined and designated by the jury; and in determining what amount shall be assessed against any particular piece or parcel of ground the jury shall take into consideration the situation of said lots and the benefits that they may receive from the extension of said avenue and highway.

"SEC. 12. That when confirmed by the court the assessments shall severally be a lien upon the land assessed, and shall be collected as special-improvement taxes in the District of Columbia, and shall be payable in five equal installments, with interest at the rate of four per centum per annum until paid. When the use of a part only of any piece or parcel of ground shall be condemned, the jury, in determining its value, shall not take into consideration any benefits that may accrue to the remainder thereof from the opening of said streets or highways, but such benefits shall be considered in determining what assessment shall be made

on or against that part of such lot as is not taken, as is hereinbefore provided.

"SEC. 13. That when the Commissioners of the District of Columbia shall have taken possession of the pieces or parcels of ground in respect to which such judgment condemning the right of way shall have been entered under the provisions of sections one and two of this act, it shall be their duty to cause a roadway of said Pennsylvania avenue southeast, as extended under the provisions herein, of such width and character of construction as in their judgment may be suitable, to be graded and regulated as soon as practicable thereafter.

"SEC. 14. That payment of the awards made in respect of the property condemned shall not be made until the assessments herein provided for shall have been made against the aforesaid property and duly confirmed."

Chapter XI, Revised Statutes of the District of Columbia, provided only for a proceeding before a jury summoned by the marshal upon the application of the proper authorities and did not provide for any proceeding whatever in court. A proceeding, therefore, strictly under chapter XI would be one of which the court had no jurisdiction. The act of March 3, 1899, it will be observed, required the institution of these proceedings by a petition filed in the said court, and the second proviso of its section 9, which refers to a method of proceeding for the condemnation of land, contemplates an appeal by any interested party. There was no provision in chapter XI for assessments of benefits by the jury, but that is provided for by section 5 of the act of March 3, 1899, under which these proceedings were instituted.

All the provisions in the act of 1899 as to assessments are in conflict with chapter XI, Revised Statutes of the District of Columbia, and give a function to the jury never exercised by them under that chapter, and section 12 just quoted, takes away from such jury the duty they had under section 261, Revised Statutes of the District of Columbia, which re-

quires them to "*take into consideration the benefit* such road may be to each owner by enhancing the value of his land, or otherwise," and to "give their verdict accordingly."

By section 12 of the act of 1899 they are expressly prohibited from doing this. The benefit was only to be considered in apportioning the assessment, or, in other words, imposing a tax upon the land within the taxation district provided by section 5 of the act of 1899.

The proceedings necessary in this case, therefore, under the act of March 3, 1899, differed in the following important particulars from the proceeding solely under chapter XI, Revised Statutes of the District of Columbia:

1. This is a proceeding within the jurisdiction and control of the court.

2. The verdict of the jury, so far as assessments are concerned, has to be confirmed by the court.

3. The province of the jury is enlarged by authorizing and requiring them to make assessments by way of taxation.

4. The duties of the jury in assessing damages are changed by prohibiting them from taking into consideration as an offset against such damages any benefits that might accrue to the remainder of any parcel of land, part of which was taken, and in requiring such benefits to be considered in determining what assessment should be made against the part not taken.

5. The act of March 3, 1899, contemplates an appeal from any decision of the supreme court of the District of Columbia confirming such assessments.

6. The act of March 3, 1899, by section 5, fixes a ratio between the damages and assessments, and by section 14

made the payment of the awards dependent upon the confirmation of the assessments.

Chapter XI, Revised Statutes of the District of Columbia, embraces sections 247 to 270, inclusive, but it will not be claimed that any but the following are material:

"SEC. 252. Whenever application shall be made to the proper authorities, by residents of the District without the limits of Washington and Georgetown, to lay out a new or alter any existing road, and whenever such authorities shall deem it conducive to the public interests to open a new road, or widen or change the course of an old one, the route of such road shall be surveyed, and a plat or map of the same prepared.

"SEC. 253. That the proper authorities shall cause notice to be given, by advertisement twice a week for three weeks, of the proposed opening of the new road, or of the alteration of an existing one, calling upon all persons who may have any objections thereto to present them to such authorities at their next regular meeting, when, if any objections are made, such objections shall be heard.

"SEC. 254. If the route only is objected to, and another suggested as more advantageous, such route may be adopted, or five discreet, disinterested men, of whom the surveyor shall be one, may be appointed to examine all the proposed routes and report such one as they shall deem most feasible and advantageous to the District, and such report shall be made to the authorities at their next meeting.

"SEC. 255. If no objection to opening or altering a road is made by the owners of the land through which it must past, after such notice, it shall be taken for granted that no damages are or will be claimed, and the road may be recorded and opened, and shall then be a public road or highway.

"SEC. 256. The notice required to be given by section two hundred and fifty-three need not be given when all the parties interested are agreed, and all roads laid out under such agreement without notice being given are lawful highways.

"SEC. 257. If any owner of land shall object and claim damages, and the amount cannot be agreed upon, the proper authorities shall direct the marshal of the District to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and appear on the premises on a day specified to assess the damages, if any, which each owner of land through which the road is to pass may sustain by reason thereof.

"SEC. 258. It shall be the duty of the marshal, upon receiving the order mentioned in the preceding section, to give the owners not less than ten days' notice of the time and place of the meeting of the jury to assess their damages.

"SEC. 259. In cases where the notice cannot be served on the owner and in all cases where the land through which it is proposed to run a road shall belong to a minor or minors, it is presumed that objection is made, and damages shall be assessed accordingly.

"SEC. 260. The marshal shall summon the jury, and administer an oath or affirmation to them that they will, without favor or partiality to any one, to the best of their judgment, decide what damage, if any, each owner may sustain by reason of running the road through his premises.

"SEC. 261. In making their decision the jury shall take into consideration the benefit such road may be to each owner by enhancing the value of his land, or otherwise, and shall give their verdict accordingly.

"SEC. 262. The jury, having been upon the premises and assessed the damages, shall make out a written verdict, to be signed by them, or a majority of them, and attested by the marshal, which the marshal shall transmit to the proper authorities at their next meeting, and which shall be recorded.

"SEC. 263. If the proper authorities or any owners of the land are dissatisfied with the verdict thus rendered, and no arrangement being made between them, the marshal shall be ordered to summon a second jury of twelve judicious, disinterested men, not related to any one interested, to meet and view the premises, giving the parties interested at least ten days' notice of the time and place of meeting. And the

marshal and jury shall proceed as before directed in regard to the first jury.

"SEC. 264. The verdict of the second jury, signed by each of the jurors, or a majority of them, shall be returned to the proper authorities at their next meeting and recorded as such.

"SEC. 265. In all cases where it becomes necessary to summon a second jury to assess damages, if the amount assessed by the second jury shall not be greater than the amount assessed by the first, the costs of the second jury shall be paid by the parties objecting to the first verdict; but if greater, they shall be paid by the District. All expenses up to the second jury shall be paid by the District.

"SEC. 266. The following fees are payable under the provisions of this chapter: Marshal's fees: For summoning each juror the marshal shall be entitled to fifty cents. For travel, per mile, going and coming to the premises to be examined, twelve and a half cents. For each day's attendance, two dollars and fifty cents. Juror's fees: For each day's attendance, two dollars.

"SEC. 267. In any case where materials of any kind shall be deemed necessary for making or repairing a public road, if the proper authorities cannot agree with the owner as to their purchase, such materials may be condemned in the same manner as provided for in this chapter in cases of condemnation of land for the purposes of a public road.

"SEC. 268. If any person shall alter or in any manner obstruct or encroach on a public road, or cut, destroy, deface, or remove any milestones set up on such road, or place any rubbish, dirt, logs, or make any hole therein, such person may be indicted, and, upon conviction thereof before the proper court, shall be fined or imprisoned in the discretion of the court, according to the nature of the offense.

"SEC. 269. Any person who, without lawful authority, shall obstruct the free use of any of the public highways, which had been used and recognized as public county roads for twenty-five years prior to May third, eighteen hundred and sixty-two, and which were thereafter duly surveyed, recorded, and declared public highways according to law, shall

be subjected to a fine for each offense of not less than one hundred nor more than two hundred and fifty dollars, and be imprisoned till the fine and the costs of suit and collection of the same are paid.

"SEC. 270. The fines provided for in the preceding section shall be collected in the name of the United States for the use of that portion of the District outside of the limits of Washington and Georgetown."

The condition upon which Sherman avenue was to be widened was that the assessment for benefits should equal one-half of the amount awarded for damages. This was the paramount purpose of the act of March 3, 1899.

The primary purpose of the act was that within ninety days after its approval the proceeding should be instituted in court, and, second, but no less important, that of the amount found due and awarded for damages not less than one-half thereof should be assessed *by said jury in said proceedings* against those pieces and parcels of land abutting on both sides of Sherman avenue.

The extension of Sherman avenue, as directed by Congress, was wholly conditional. The extension was not to be made unless the assessment for benefits was at least one-half of the award of damages. This was the fundamental and indispensable foundation of the proceeding. The benefits and damages were thus inseparably yoked together. The equation was required to have and retain these proportionate factors; otherwise Congress declared in effect there should be no extension of Sherman avenue. These appellees accepted the awards of damages for, and they acquiesced in the assessments of benefits against, their other property, and, having done so, they are not at liberty now to destroy the equation which existed when the court confirmed as an entirety the action of the jury.

The claim of the appellees is clearly untenable. Accord-

ing to their claim, it was the right of any one of the owners of the one hundred and fifty pieces of land condemned for the extension of Sherman avenue, upon his mere expression of dissatisfaction with the award of damages, to set aside the entire work of the jury. For to grant the second jury as to one such owner necessarily destroys the essential elements of proportionate equality as between the damages and assessments, and leaves uncertain the ultimate condition upon which alone the extension is to be allowed. If these appellees have a right, as claimed, to a second jury, then each of the owners of the remaining one hundred and forty-nine pieces of land condemned for the extension of Sherman avenue has such right, and each such owner *toties quoties* could, upon mere demand, have each successive verdict set aside, and it would be impossible to reach a final verdict, and thus the extension directed by Congress would be prevented and practically defeated. To say that the law can be so construed is to impute to Congress an utterly absurd purpose and intent in dealing with this most important public matter.

In Wight *et al.*, Commissioners, *vs.* Davidson *et al.* (181 U. S., 371), this court was called upon to construe the act of Congress, approved March 3, 1899, "to extend 'S' street in the District of Columbia." The terms of that act are almost identical with the act under consideration; its general features are the same. It requires the jury to assess as and for benefits one-half of the amount awarded as damages. Section 5 provided:

"That the proceedings for the condemnation of said lands * * * shall be under and according to the provisions of chapter 11 of the Revised Statutes of the United States relating to the District of Columbia, which provide for the condemnation of lands in said District for public highways."

This is a reproduction *in totidem verbis* of section 9 of the act for widening Sherman avenue.

The proceedings in that case were identical with the case at bar. The jury of condemnation filed its verdict, award, and assessment. Exceptions were filed by the appellees, claiming that the act of Congress was unconstitutional and void, and because "the award of damages and finding of the jury in that behalf are excessive, unjust, and unreasonable. These respondents therefore, each and severally, request and demand said award and finding to be set aside, and that a new jury be impaneled in accordance with the provisions of the statute in such case made and provided."

Mr. Justice Shiras, delivering the opinion of this court, reversing the judgment of the Court of Appeals, said:

"Upon the authorities heretofore cited it would therefore appear that the act of Congress of March 3, 1899, was a valid enactment, and *that the proceedings thereunder were regular*, and constituted due process of law, unless reasons for a different conclusion can be found in the opinion of the Court of Appeals, which reversed the decree of the supreme court of the District, and ordered the dismissal of the petition."

The opinion of the Court of Appeals is then discussed, and the erroneous view of the statute taken by that court as to the constitutionality of the act of Congress and the proceedings had thereunder is shown and declared.

The exceptions filed in the case at bar are not as specific in respect to the claim of a second jury as in that case; there the exceptants *requested and demanded "that a new jury be impaneled in accordance with the provisions of the statute;"* here the exceptants (Rec., p. 6) complained of excessive and unjust assessments, and concluded as follows (Rec., p. 8):

"Wherefore, for the reasons hereinbefore stated, these exceptants pray that *said verdict*, award, and assessment be *not confirmed by this honorable court*, but that the same be vacated, set aside, and nothing held."

Construing the act of Congress granting land to the Union Pacific Railroad Company, this court said:

"If, as we think it manifest, the leading primary policy of the act was to place the lands in the hands of the company to be used for the completion of the road, as this work progressed, any secondary policy the Government may also have had in view ought not to be allowed to embarrass or defeat that which was primary. It is evident Congress thought there might be remnants of the grant, not used in aid of the construction of the road, either because other resources of the company might prove sufficient, or because it might be found impossible to dispose of them in time to furnish such aid, and those remnants it undertook to open to settlement and pre-emption. This appears to us to have been what was intended, and all that was intended. The construction gives full effect alike to the paramount and the subordinate purposes of the act. Each has its own field of operation. The construction contended for by the appellant restricts the power of disposition, denies the authority of the company to utilize, except partially, for the purposes of the grant, the land granted, and might have impaired and possibly defeated the leading purpose of the grant. It subjects the paramount to the subordinate, and postpones the primary object to the secondary. He has, therefore, no equitable title to it."

Platt *vs.* Union Pacific R. R., 99 U. S., at p. 65.

As was said by this court in Luxton *vs.* North River Bridge Company (147 U. S., 337):

"This direction that the proceedings in the circuit court of the United States shall 'conform as nearly as may be to the practice in the courts of the State' must, of course, like the corresponding direction as to practice, pleadings and procedure in section 914 of the Revised Statutes, give way whenever to adopt the State practice would be inconsistent with the terms, defeat the purpose, or impair the effect of any legislation of Congress (Indianapolis & St. L. R. Co. *vs.* Horst, 93 U. S. 291; *Re* Chateaugay Ore & I Co., 128 U. S. 544; Southern Pacific R. Co. *vs.* Denton, 146 U. S. 202)."

When there are two acts relating to the same subject, effect is to be given to both if that be practicable. If the two are repugnant the latter will operate as a repeal of the former.

Chi., M. & St. P. R'y *vs.* U. S., 127 U. S., 406.

"Resort may be had to every part of a statute, or, where there is more than one *in pari materia*, to the WHOLE SYSTEM, for the purpose of collecting the legislative intention, which is the important inquiry in all cases where provisions are ambiguous or inconsistent."

Kohlsaat *et al. vs.* Murphy, 96 U. S., 153.

"It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it."

The Lessee of Henry Brewer *vs.* Blougher, 14 Peters, 178.

In the case of The Washington Market Company *vs.* James A. Hoffman (101 U. S., 112) the question before the court was the construction of the charter of the Washington Market Company, an act of Congress approved May 20, 1870.

One part of the act provided that the company should offer the stalls in the market "for sale at public auction for one or more years to the highest bidder or bidders," and that "the stalls, stands, and privileges of all kinds in said market, to be used for market purposes when offered for public sale, shall be let to the highest bidder."

Under this provision the market company let to James A. Hoffman, the appellee, one of the stalls in the market for the definite period of two years.

Another provision in the charter was as follows:

"And the person who shall offer the highest price at or beyond said minimum for any such stand, stall, or privilege shall be entitled to the occupation thereof, and shall be considered as having the good will and the right to retain the possession thereof so long as he chooses to occupy the same for his own business and pay the rent thereof."

It was claimed by Hoffman that under this last-quoted clause he had the right to continue in possession of the stall after the expiration of the two years.

In the opinion delivered in this case this court said:

"To understand the true meaning of the clause, it is necessary to observe what the subject was in regard to which Congress attempted to legislate. In Brewer *vs.* Blougher, 14 Pet. 178, it was said to be the undoubted duty of the court to ascertain the meaning of the legislature from words used in the statute and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never designed to include in it. Now, the subject upon which Congress attempted by this clause to legislate was the rights for the highest bidders for a stall, under a purchase for a term of years, and not the rights of a purchaser under a bid for an indefinite period, terminable only at his will. Nothing else was in view of the legislature. No other sale had been spoken of. The enactment, therefore, that he should have the good will and possession of the stall so long as he might choose to occupy it, paying the rent, must have reference to possession during the term, for that was the only point under consideration. Such a construction of the clause gives effect to it, denies effect to no other words or provisions in the statute, and is in strict harmony with every part. It is the only construction that harmonizes all the provisions of the act."

And this court held in that case that the purchaser of the right to sell in the market under that act of Congress acquired no right beyond the term of years for which the sale was made.

"There is no better way of discovering the true meaning of the law, when there are expressions in it which are rendered ambiguous by connection with other clauses, than by construing the necessity for it and the causes which induced the legislature to pass it" (Heydenfeldt *vs.* Daney Mining Co., 93 U. S., 634).

"If the literal interpretation of any part of it would operate unjustly, or lead to absurd results, and be contrary to the evident meaning of the act taken as a whole, it will be rejected" (Heydenfeldt *vs.* Daney Mining Co., 93 U. S., 634).

In the above case this court construed the following provision in the Nevada enabling act, approved March 21, 1864. The seventh section of that act is as follows:

"That sections number sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section and as contiguous as may be, shall be and are hereby granted to said State for the support of common schools."

It was contended that the terms of this provision constituted a grant *in presenti*, and that the exception contained therein could not apply to any sale of lands by the Government subsequent to the act under the mineral-land laws. Considering the condition of things existing at the time of the passage of the act, and that no sales had been made by the Government prior to the act; that Congress was fully advised of the condition of a new community like Nevada and of all antecedent legislation upon the subject of the public lands, this court held that a sale of all land embraced in one

of the sections described in the mineral-land laws, and subsequent to the passage of the enabling act, excluded such lands from the operation of the act.

"It is well settled that where the language of the statute is in any manner ambiguous, or the meaning doubtful, resort may be had to surrounding circumstances, the history of the times, or the defect or mischief which the statute was intended to remedy" (Smith *vs.* Townsend, 148 U. S., 49).

Rules for the construction of statutes look to the whole and every part of a statute, to the apparent intention derived from the whole, to the subject-matter, to the effects and consequences, and to the reason and spirit of the law.

Washington Market Co. *vs.* Hoffman, 101 U. S., 112.
Hydenfeldt *vs.* Daney, etc., Mining Co., 93 U. S., 634.
Neal *vs.* Scruggs, 95 U. S., 704.
Kohlsaat *vs.* Murphy, 96 U. S., 153.

It was not the duty nor within the power of the Commissioners to order a second jury.

In the opinion of the Court of Appeals rendered in this case it is stated that it is the duty of the authorities authorized to institute and prosecute the proceedings of condemnation to cause the second jury to be summoned and not the duty of the dissatisfied owner, and it is said that all affirmative acts prescribed by the statute (referring to chapter XI, R. S. D. C.) in perfecting the proceeding must be shown to be complied with by the parties authorized to take and prosecute the proceedings.

It will be observed that many of the preliminary proceedings required by chapter XI are obviated by the act of March 3, 1899, which determines the necessity of the taking of the land for the widening of the road, and substitutes a proceeding in court for the proceeding contemplated in chapter XI.

Under an act of the legislature of Massachusetts a proceeding was authorized for the taking of land by the Eastern Railroad Company. The act authorized the court to appoint commissioners to assess damages, and also provided that all general laws relating to the taking of land for railroad purposes should be applicable to and govern the proceedings in the taking of land under that act. By the general laws referred to damages occasioned by taking land by a railroad were to be estimated in the first instance by county commissioners, and "either party, if dissatisfied with the estimate made by the commissioners, may, at any time within one year after it is completed and returned, apply for a jury to assess the damages."

The supreme court of Massachusetts, construing that act, by Gray, C. J., said:

"Under those laws, the estimate of the commissioners being returnable before themselves, the application for a jury is of course to be made to them, and the jury to be ordered by them is a sheriff's jury, whose verdict is certified to the superior court. (See Gen. Sts., c. 43, §§ 19 & *seq.*) The alternative allowed by the st. of 1873, c. 261, of a trial by jury at the bar of the superior court, is limited to cases in which it is provided by law that a sheriff's jury may be had.

"The statute now before us imposes the duty of adjudicating the damages, which ordinarily rests with the county commissioners, upon commissioners to be appointed by this court, and enacts that from their decision 'an appeal to a jury shall lie' in behalf of the land-owner. It contains no provision as to the return or recording of the award of these commissioners, and does not specify in what tribunal the application for a jury shall be made or the trial by jury had. But it is settled, by repeated decisions, that commissioners appointed by this court and deriving all their powers from their judicial appointment must, by necessary implication, without any express statute direction, return their award to the court which appoints them,

to be there examined, and, if no sufficient cause to the contrary is shown, confirmed and recorded (Charles River Mills *vs.* Mill Creek Mills, 7 Pick., 207; Boston & W. R. *vs.* Western R. R., 14 Gray, 253; Hingham & Quincy Bridge *vs.* Norfolk, 6 Allen, 353, 356; New London R. *vs.* Boston & A. R. R., 102 Mass., 386, 388; case of Supervisors of Elections, 114 Mass., 247; Brayton *vs.* Fall River, 124 Mass. 95). The jury is therefore to be applied for after the award of the commissioners has been returned into and accepted by this court, and by way of appeal from the award so accepted. The reasonable, if not the necessary, construction of the statute appears to us, to be, that the application for the jury should be made and the trial had at the bar of this court, in which the whole record of the case from the beginning remains, rather than that the legislature should be presumed to have intended that a proceeding in the nature of an appeal should lie from a judgment of the highest court of the Commonwealth to an inferior tribunal.

"The construction of the statute avoids the grave constitutional difficulties attendant upon holding that the legislature meant, either to confer upon this court the duty of appointing independent officers who do not aid in the performance of its own duties, and whose proceedings are not returned to it or subject to its direct control or revision, or else to allow an application, in the nature of an appeal from a judgment of this court, to the county commissioners.

"The course of legislation and decision in other like cases affords no sufficient grounds to control our conclusions."

Wyman *vs.* Eastern R'y Co., 128 Mass., 346.

The impaneling of a second jury of twelve is the grant of a privilege; it is therefore to be strictly construed and a party claiming the privilege is required to directly claim it and to strictly follow its terms and provisions.

This court in Hannibal & St. J. R. R. Co. *vs.* Missouri R. P. Co., 125 U. S., 260, said:

"But if there be any doubt as to the proper construction of this statute (and we think there is none) then that con-

struction must be adopted which is most advantageous to the interests of the Government. The statute, being a grant of a privilege, must be construed most strongly in favor of the grantor."

Gildart *vs.* Gladstone, 12 East, 668; Charles River Bridge Co. *vs.* Warren Bridge Co., 36 U. S. (11 Pet.), 554; Dubuque & P. R. R. Co. *vs.* Litchfield, 64 U. S. (23 How.), 66; Rice *vs.* Minnesota & N. W. R. R. Co., 66 U. S. (1 Black), 380; Leavenworth L. & G. R. R. Co. *vs.* U. S., 92 U. S., 733; Northwestern Fertilizing Co. *vs.* Hyde Park, 97 U. S., 660.

The filing of exceptions to the verdict and award by the appellees was a waiver of the right to a second jury, if any such right existed. The pretense of a claim of request and demand for a second jury under chapter XI was made for the first time by appellees in their brief in the Court of Appeals.

As was said by this court in Dundee Mortgage & Inv. Co. *vs.* Hughes, 124 U. S., 157:

"As there was in this case no written consent to the order for a trial by referee, it would have been error in the court, if objection had been made, to proceed with a new trial of the case after the report was set aside, without a stipulation in writing waiving a jury, as provided by section 649 of the Revised Statutes (of Oregon); but no such objection was made, and the court proceeded, evidently in accordance with the understanding of the parties, to make new findings, precisely as it would if the order of reference had been actually under the code upon a consent in writing. No exception was taken to this procee ling in the court below, and it is too late to make it here for the first time."

In a condemnation proceeding in Dakota it was held that—

"two courses are left open to a dissatisfied party. He may except to the report, and thereby raise all questions of law as to its legality and insufficiency; or he may demand a jury trial, in which event his damages shall be assessed by

a jury through a regular trial in court. But it was never contemplated that both should be used at the same time or that the latter included the former. When exceptions are filed it is the report of the commissioners that is to be tested. It may be affirmed, modified or rejected and a new appraisement may be ordered. Necessarily this is done by the court and there is no place in the proceeding for a jury. On the other hand when a jury trial is demanded the whole matter of compensation is in the jury's hands."

Minn., St. P., etc., R'y *vs.* Nester, 3 N. Dak., 480.

"A land-owner who has been awarded damages for the appropriation of his land for a public road and who has had his day in court, on exceptions to the award has no standing to petition the court for a jury to assess his damages."

In re West Whiteland Rd., 4 Pa. Co. Ct. R., 511.

"Exceptions to the report of viewers and an appeal for trial by jury cannot in condemnation proceedings be both taken and insisted on at the same time, but the court will compel the municipality to elect on which it will rely."

Bechtel *vs.* Borough of Bechtelville (Com. Pl.), 3 Pa. Dist. R., 713.

The laws of Massachusetts provide that a party who is dissatisfied with the estimate made by the county commissioners of the damages caused by taking land for a railroad company "may apply for a jury to assess the damages either at the same meeting at which such estimates shall be completed and returned or at the next regular meeting therefor."

It was held by the supreme court of Massachusetts, construing this statute, that where a party applied for a jury at the same meeting at which the estimate is completed and recorded, and then failed to pursue his remedy, that he could not by merely omitting or refusing to proceed, entitle himself to a jury by applying therefor at the next regular meeting of the commissioners. Although he had the absolute right

under the statute to apply at the next regular meeting, it was held that by his action he had waived that right.

Taylor *vs.* County Commissioners of Plymouth, 13 Metc., 449.

Under a similar statute, in the same State, a party whose land was taken for a road was granted the right to apply for a jury to revise the judgment of the county commissioners in the assessment of damages within a specified time. Where the petitioners delayed proceedings under the petition for a jury in the belief derived from conversations with some of the county commissioners that some action would be taken with reference to a verbal application made for the relocation of the highway, and then after the time prescribed by the statute applied for a jury, it was held that he had waived his right. The opinion of the court contains the following expression:

"The petitioner's right to a jury was a right which he might waive and abandon, and which must be taken to have been abandoned if the statutory requirement is not complied with."

Thorndyke *vs.* County Commissioners of Norfolk, 117 Mass., 566.

Construing the same statute, the supreme court of Massachusetts held, in the case of a condemnation proceeding in behalf of a railroad corporation, that where the county commissioners had assessed the damages for the taking of land and the railroad company had applied, under the statute, for a jury to assess the damages, and thereafter had discontinued its petition for the jury and accepted the award of the commissioners, that the owner of the land, not having himself filed a petition for a jury, could not insist upon a trial by jury without having asserted the right as required by the statute. The court, by Gray, C. J., said:

"A petition for a jury is not strictly an appeal and does not affect the award of the commissioners. The petitioner had the right at any stage of the proceedings, and upon such terms as the court should order, to waive a trial by jury, and accept the award of the commissioners" (Fall River R. R. Co. *vs.* Chase, 125 Mass., 483).

If the owner accepts the damages awarded he cannot object to the report, either on account of the amount awarded or on any other ground.

Lewis on Eminent Domain, sec. 531.

In Re Application of Woolsey, 95 N. Y., 135.

After receiving damages parties cannot be heard against the validity of the proceedings or appeal from the same, although they may be in fact erroneous.

Mills' Eminent Domain, § 329.

Miss. R. R. *vs.* Byington, 14 Iowa, 572.

Embury *vs.* Connor, 3 N. Y., 511.

Town *vs.* Blackberry, 29 Ill., 137.

Karber *vs.* Nellis, 22 Wis., 215.

Kile *vs.* Yellowhead, 80 Ill., 208.

Chatterton *vs.* Parrott, 46 Mich., 432.

It is respectfully submitted that the Court of Appeals was in error, as herein specified, and that the judgment of that court should be reversed.

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Attorneys for Appellants.

No. 331.
NOV 4 1902
JAMES H. McKENNEY, Clerk.
Brf. of Maddox for Appellees.
Filed Nov. 4, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 331.

HENRY B. F. MACFARLAND AND OTHERS,
APPELLANTS,

vs.

JESSE BROWN AND ROSA WALLACH.

ARGUMENT AND BRIEF IN BEHALF OF APPELLEES.

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Supreme Court of the United States.

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No. 331.

HENRY B. F. MACFARLAND AND OTHERS,
APPELLANTS,

vs.

JESSE BROWN AND ROSA WALLACH.

ARGUMENT AND BRIEF IN BEHALF OF APPELLEES.

Statement of Facts.

This was a proceeding instituted by the Commissioners of the District of Columbia in the supreme court of the District, sitting as a district court, for the condemnation of certain lands needed for the widening and extension of Sherman avenue, under an act of Congress approved March 3, 1899. The provisions of this act material to the consideration of this appeal are the following:

"SEC. 5. That within ninety days after the approval of this act the Commissioners of the District of Columbia be, and they are hereby authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a district court, a proceeding to condemn the land necessary for the extension and widening of Sherman

avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet.

"That of the amount found due and awarded for damages for and in respect of the land condemned under this act for the extension and widening of said Sherman avenue not less than one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting on both sides of Sherman avenue, and the extension thereof as herein provided, to a distance of three hundred feet from the building lines on the east and west sides of Sherman avenue as widened and extended: *Provided*, That no assessment shall be made against those pieces or parcels of ground out of which land has already been dedicated to the District of Columbia for the purpose of widening Sherman avenue as herein provided for."

"SEC. 9. That the proceedings for the condemnation of the lands as provided for in this act shall be under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, which provide for the condemnation of lands in said District for public highways; and to provide the necessary funds for the cost of such condemnation proceedings the sum of three thousand five hundred dollars is hereby appropriated out of the funds of the District of Columbia: *Provided*, That each juror shall receive a compensation of five dollars per day for his services during the time he shall be actually engaged in such services under the provisions of this act: *And provided further*, That no appeal by any interested party from any decision of the supreme court of the District of Columbia confirming said assessment or assessments shall delay or prevent the payment of said awards in respect to the property condemned."

Chapter 11, above referred to in section 9, commonly known as the "Highway Act," contains elaborate provisions for the condemnation of lands for public highways. The sections of this act which are material on the hearing of this appeal are the following:

"SEC. 252. Whenever application shall be made to the proper authorities, by residents of the District without the limits of Washington and Georgetown, to lay out a new or

alter any existing road, and whenever such authorities shall deem it conducive to the public interests to open a new road, or widen or change the course of an old one, the route of such road shall be surveyed, and a plat or map of the same prepared.

"SEC. 257. If any owner of land shall object and claim damages, and the amount cannot be agreed upon, the proper authorities shall direct the marshal of the District to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and appear on the premises on a day specified to assess the damages, if any, which each owner of land through which the road is to pass may sustain by reason thereof.

"SEC. 260. The marshal shall summon the jury, and administer an oath or affirmation to them that they will, without favor or partiality to any one, to the best of their judgment, decide what damage, if any, each owner may sustain by reason of running the road through his premises.

"SEC. 261. In making their decision the jury shall take into consideration the benefit such road may be to each owner by enhancing the value of his land, or otherwise, and shall give their verdict accordingly.

"SEC. 262. The jury, having been upon the premises and assessed the damages, shall make out a written verdict, to be signed by them, or a majority of them, and attested by the marshal, which the marshal shall transmit to the proper authorities at their next meeting, and which shall be recorded.

"SEC. 263. If the proper authorities or any owners of the land are dissatisfied with the verdict thus rendered, and no arrangement being made between them, the marshal shall be ordered to summon a second jury of twelve judicious, disinterested men, not related to any one interested, to meet and view the premises, giving the parties interested at least ten days' notice of the time and place of meeting. And the marshal and jury shall proceed as before directed in regard to the first jury.

"SEC. 264. The verdict of the second jury, signed by each of the jurors, or a majority of them, shall be returned to the proper authorities at their next meeting and recorded as final and conclusive, and the road shall then be declared a public road, and opened as such.

"SEC. 265. In all cases where it becomes necessary to summon a second jury to assess damages, if the amount as-

sessed by the second jury shall not be greater than the amount assessed by the first, the costs of the second jury shall be paid by the parties objecting to the first verdict; but if greater, they shall be paid by the District. All expenses up to the second jury shall be paid by the District."

Acting under and by virtue of the provisions of this highway act, the marshal summoned a jury of seven, who viewed the premises, heard the testimony of witnesses, and rendered a verdict, filed in the cause May 9, 1900, awarding damages for the lands taken and assessing one-half of the damages so found as benefits to adjoining and nearby lands.

By a sort of tacit understanding between counsel for the several parties in interest, proceedings were stayed at this point until the final hearing in this court of another case wherein the constitutionality of the act of March 3, 1899, was assailed (181 U. S., 371). The validity of the act was upheld by this court and its opinion handed down on the 29th of April, 1901. Shortly thereafter the District Commissioners procured an order of ratification *nisi*, thus indicating for the first time their satisfaction with the verdict of the jury of seven. Immediately thereafter Mr. Brown and Mrs. Wallach, who, as the record discloses, own many parcels of land affected by the proposed widening and extension of Sherman avenue, filed exceptions to the verdict, award, and assessment of the jury of seven. These exceptions were overruled at the special term and an order entered on the 2d day of October, 1901, whereby the verdict was confirmed. From this order Brown and Mrs. Wallach appealed to the Court of Appeals of the District, assigning for error that—

"*The court erred in confirming the verdict of the jury of seven and refusing to order a jury of twelve.*"

The Court of Appeals reversed the judgment of the special term and remanded the case for further proceedings in conformity with its opinion (R., p. 18). From this ruling of the Court of Appeals the present appeal is being prosecuted by the Commissioners of the District of Columbia.

POINTS AND AUTHORITIES.

I.

An inspection of the record discloses that the verdict is unreasonable and oppressive; one item is unconscionable.

It will be perceived that the appellees are large owners of land on both sides of Sherman avenue, and that parts of many lots belonging to them are taken for widening that avenue, which runs through a thinly populated section of the District. The act provides that Sherman avenue shall be extended from Florida avenue to Whitney avenue, with the uniform width of one hundred feet. So wide a street in that locality is not called for by any present public need. We may assume, then, that when Congress passed the act of March 3, 1899, so far at least as it provides for the widening of Sherman avenue, it was legislating with a view to the possible future development of the city and District; and although in these latter days Congress has authority to determine what part of the cost of a proposed public improvement shall "be assessed upon the owners of lands benefited thereby" (167 U. S., 589), it may well be questioned whether or not any of the lands upon which assessments have been made are more benefited by this wide street than are the lands in other portions of the District. All other streets in that section are in the main but sixty feet wide, with the exception, perhaps, of Eleventh street, intended as a thoroughfare. And it may be further assumed that these streets are of sufficient width to accommodate all present needs.

An examination of the awards of damages and assessments of benefits in connection with the several lots belonging to appellees and the relative positions of these lots make it clear that gross inequalities are found in the verdict

in respect of the apportionment of benefits. Lots 1 and 13, block 18, have now a frontage of 150 feet on Marshall street. They can be subdivided into eight building lots, fronting south, of sufficient dimensions for houses in that neighborhood. The widening of Sherman avenue takes away nearly two of such lots, which are worth in the market today, according to the valuation made by the jury, an average of 55 cents per square foot, or $1,650. For this appellants are allowed $500, or a loss of $1,150, which sum they must contribute to a supposed public convenience, though no resulting benefit to either of these lots is apparent. The same is true of lots 1 and 12, block 15, of lots 10 and 11, block 14, and of lots 12 and 13, block 5.

In block 5, lot 17, appellants lose a lot fronting 20 feet on Steuben street, by a depth of 50 feet, for which they are allowed the munificent sum of $25, the difference between the award of damages and the assessment of benefits in respect of that lot.

In block 11, lot 8, appellants have now a frontage of 150 feet on Irving street by a depth of 50 feet. The portion of this lot included in the proposed widening of Sherman avenue 30 x 50 feet has now a north and south frontage. For this the jury allowed a net amount of but $50, the difference between damages and benefits.

For lots 17 and 18, block 17, appellants are allowed $175 net for the part taken from each, although no frontage is lost. Here benefits and damages might possibly be computed as offsetting each other.

When we examine the jury's award of damages and supposed benefits in respect of part of lot 3, block 19, we find inequality which practically amounts to confiscation. Of this lot appellants now own the northern triangular portion, with a present frontage on Sherman avenue of 218.6 feet and a depth along the south line of 60 feet. With these dimensions the lot contains 10,042 square feet. Of this area 5,487.5 feet will be taken when the avenue is widened as

projected, and the amount awarded therefor is $4,116, or at the rate of 75 cents per square foot. This, then, in the opinion of the jury, is the present value of the lot, and according to this the entire lot—10,042 square feet—is worth $7,531, without allowing any increase in value by reason of the proposed widening of the street.

When the street is widened there will remain to the appellants a very much smaller triangular piece of ground, with a frontage on the avenue of but 147.2 feet, a greatly reduced basic line, and an area of 4,555 square feet. Although this bit of land is not available for any valuable use, there is an assessment against it as for benefits of $3,410, or at the same rate per square foot (75 cents) as the damages awarded for land taken. On all other lots the rate of assessment is, at an average, less than 10 cents a square foot.

Figured another way, the result is still more startling. According to the estimate of the jury, the part of lot 3 belonging to appellants is worth $7,531, being for 10,042 square feet at 75 cents per foot. Of this, 5,487 feet are taken, and they are to be paid for it $706, being the difference between the damages awarded, $4,116 (R., p. 5), and the assessment charged, $3,410 (R., p. 13). Wherefore, to come out whole, the appellants must sell the part of this lot which is left, 4,555 square feet, for $6,825, being the present value of the lot, $7,531, less the net result of the taking, $706. In other words, they must sell the little piece which is left for about $1.50 per square foot—a thing they could scarce hope to do in another hundred years of District growth.

The only "judicious" juror in this combination of seven seems to have been A. D. Hazen, who regretted his inability to agree with the majority "on the question of an equitable apportionment among the several pieces of land of the gross amount assessed as benefits and needed to meet the award for damages" (R., p. 5). It almost looks as if the other six of this jury of seven, when they reached the top of the street, dumped upon this little triangular lot belonging to appellees

all that was left of the *amount needed to make up the award of damages.* In this way the two sides of the equation contemplated by the act—assessments for benefits = one-half award of damages—are maintained. This is "substantial injustice" and "manifestly wrong," the two elements which induce courts to set aside verdicts in such cases.

II.

The appellees having indicated dissatisfaction with the verdict of the jury of seven, the District authorities have no power to proceed further in the cause without first procuring a jury of twelve to be summoned.

The act of March 3, 1899, of itself provides no machinery for ascertaining the value of the lands to be condemned for the proposed public improvement or estimating the benefits which it is assumed will accrue to adjoining lands. This is to be accomplished by the agencies provided by chapter 11 of the Revised Statutes of the United States relating to the District of Columbia, to which reference is made, and this latter act recourse must be had to ascertain the respective rights and immunities of the public and the landowner.

The rule of construction in such cases is well stated by Mr. Chief Justice Marshall in the case of United States *vs.* Simms, 1 Cranch, 252, where, in commenting upon the acts of Congress of the 27th of February and 3d of March, 1801, relating to the District of Columbia, he said that the laws of Maryland were by those acts "considered as having been re-enacted by Congress *totidem verbis.*"

And in a more recent case in the Court of Appeals (Peake *vs.* United States, 16 App., D. C., 415), the same rule of construction was followed in a suit upon a bond given by a con-

tractor for Government work, as required by an act of Congress of August 13, 1894, entitled "An act for the protection of persons furnishing material and labor for the construction of public works." In this case the point was made that there could be no recovery on the bond, because it did not contain such provisions as the act required for the protection of material men and others, though such provisions were found in the contract, to which reference was made in the bond. But the court held the point not well taken and say in its opinion (p. 419):

"Plainly, therefore, the contract is as much a part of the bond as though it had been copied verbatim into it; and when the bond sufficiently indicates the covenants which it intends to secure, we know of no dictate of reason or rule of law that would require their repetition in the bond."

In the case of Quackenbush *vs.* District of Columbia, 20 D. C., 300, the highway act was the subject of consideration. True it may be the point now under discussion—the right to have a jury of twelve—was not presented in the Quackenbush case, but the purposes of the act are very clearly stated by Mr. Justice James, who announced the judgment of the court in the following significant language:

"The provisions of this statute are to be read in the light of the constitutional provision which forbids even the whole nation to take for its own use the property of an individual without just compensation for it. His right to retain that property, or to have its equivalent, is thus surrounded with an inviolable character. A statute which should disregard that right would itself be a nullity and no statute is to be construed to intend any jeopardy or diminution of it unless such intention be too plain to be ignored. On the other hand the legislature is to be understood to require the most complete observance of provisions for an opportunity to secure just compensation, especially because they are made for the protection of the individual owner in a proceeding which is, in contemplation of law, wholly *in invitum*. From this point of view it is plain that the statute before us intends the advertised notice to be effective as a protective

warning; and, therefore, intends that it shall be such a notice as shall inform the owner of the land that it is his land that is about to be taken for public use."

If strictness of notice be required, why should other provisions of the act intended for the protection of the property-owner be ignored? The more especially should every such provision be given its full effect in view of the fact that Congress has power to provide by legislative enactment "that, of the amount found due and awarded as damages for and in respect of the land condemned for the opening of said streets, not less than one-half thereof should be assessed by the jury in said proceedings against the pieces or parcels of ground situated and lying on each side of the extension of said streets" (181 U. S., 381) as benefits to such lands. This carries the right of the sovereign to take private property for public use to a point of extreme danger to the individual. It is an arbitrary assessment, "irrespective of the actual amount of benefit," and leaves nothing to the jury "but to apportion at least one-half of the cost, and as much more as they may think proper, between the adjacent lots."

Wherefore, as Justice James well said, "the legislature is to be understood to require the most complete observance of provisions for an opportunity to secure just compensation." The most marked of these is the right of appeal from a jury of seven to a jury of twelve.

It may well be that the Congress had in mind the protective features of chapter eleven when the act of March 3, 1899, was passed. The highway act became a law before governmental centralization, extension, and expansion had reached their present stages of development. It created two agencies or tribunals for safe-guarding private rights against encroachment in the name of the public. One of these is a "jury of seven, judicious, disinterested men, not related to any party interested" (sec. 257); the other is a jury of twelve, also required to be "judicious, disinterested and not related

to any party in interest" (sec. 263). To this latter an appeal is given, as matter of right, as well to the "proper authorities" as to "any owners of the land," in the event that they or any of them are dissatisfied with the verdict of the jury of seven. To prevent captious objections on the part of landowners, it is further provided that "if the amount assessed by the second jury shall not be greater than the amount assessed by the first, the costs of the second jury shall be paid by the parties objecting to the first verdict" (sec. 265). This is nothing more nor less than an appeal from a statutory tribunal (the jury of seven) to a tribunal whose establishment antedates our Constitution, and is referred to in Magna Charta as "the principal bulwark of our liberties."

As is said by Mr. Justice James (20 D. C., 314):

"It is not to be supposed that when they embodied their ancient tradition in their constitution, this people intended to alter the relations of private right and public benefit. It was not alone the former that they considered. As they had said in the preamble to that instrument, they were engaged in providing for 'the general welfare,' and this protection of private property was understood by them to be one of the means of promoting that welfare. They knew, as well as Blackstone did, that, 'the public good is in nothing more interested than in the protection of every individual's private rights, as modified by the municipal law;' and in thus securing 'every individual's private rights,' they substantially affirmed that the general welfare and true public policy require that communities shall make compensation for what they take, and that they shall not evade that obligation by any construction."

It has been the uniform practice of the supreme court of the District to order a second jury in proceedings under the highway act, when any person whose land was being condemned indicated dissatisfaction with the verdict of the jury of seven. No case seems to have found a place in the published reports, though the point was directly passed upon by the court in general term in the proceeding instituted for

the condemnation of lands for the new library building (cause No. 333 on the District court dockets). This case was certified from the special to the general term on exceptions of a land-owner to the verdict of the jury of seven. The general term remanded the cause, with directions to summon a jury of twelve (5 Minutes General Term, p. 437, July 9, 1886).

A more recent case (district court, No. 543) is the proceeding for the condemnation of lands needed for the widening of Nineteenth street under an act of Congress approved February 25, 1899 (30 Statutes at Large, p. 891). The act provides that "such proceedings shall be prosecuted under and in accordance with the provisions of sections two hundred and fifty-seven and two hundred and sixty-seven, both inclusive, of the Revised Statutes of the United States relating to the District of Columbia, concerning the condemnation of lands in said District for public highways," the same being sections of the highway act. On the 4th of March, 1899, a jury of seven was summoned, and a verdict returned by them. With this verdict the "proper authorities," the Commissioners of the District, were dissatisfied, and filed a petition in the cause averring that the amount awarded as damages for the lands condemned was "excessive and beyond the just value thereof." A second jury of twelve was forthwith summoned, as matter of course. The only possible distinction between the two cases consists in the fact that in the Nineteenth Street case the Commissioners of the District were dissatisfied with the verdict of the jury of seven, whereas in this case the complaint comes from private individuals, who assert that the amount found due and awarded by the jury of seven as damages for lands taken is "insufficient and inadequate" and the assessment for benefits is "excessive and exorbitant" (R., p. 6).

It is difficult to conceive how the appellees could have made known more positively and emphatically the fact that they were and are dissatisfied with the verdict of the jury of

seven. Surely it cannot be necessary for them to employ the very words used in the statute and say they are "dissatisfied with the verdict." This would be a frittering away of substantial rights guaranteed by the Constitution and recognized in the statute.

Nor yet was it necessary for the appellees to in terms ask for the summoning of a jury of twelve. On this point the opinion of the court below, announced by Mr. Chief Justice Alvey, is unanswerable. He says (R., p. 17):

"But it must be borne in mind that it was not the duty of the appellants (appellees now), as owners of the lands proposed to be condemned, to demand a summoning of a second jury. The statute does not require it of them. That is the duty of the authorities authorized to institute and prosecute the proceedings of condemnation to completion. The owners of the lands proposed to be condemned are placed in the position of defendants, or opponents of the proceeding of condemnation; and, consequently, all affirmative acts prescribed by the statute in perfecting the proceeding, must be shown to have been complied with by the parties authorized to take and prosecute the proceeding. The whole proceeding is strictly statutory, and it must be affirmatively shown that all the provisions of the statutes that apply to the proceedings have been substantially complied with otherwise the whole proceeding would be void and without effect."

In Bauman *vs.* Ross, 167 U. S., 548, the late Mr. Justice Gray elaborately reviews the several acts of Congress embodied in the highway act. After commenting upon the various provisions of these several acts, and the right and duty of the jury of seven to consider the question of benefits in making up their verdict, he says (572):

"If the court or any land-owner was dissatisfied with that verdict, the matter might be submitted to the verdict of a jury of twelve, proceeding as before, the verdict of whom, or of a majority of whom, was final."

The argument *ab inconvenienti* urged in the court below by the learned corporation counsel—that to set aside verdicts of

juries of seven in street-extension cases where the land-owners are dissatisfied therewith would lead to infinite confusion and might destroy the equation which must subsist between awards and assessments—was effectually disposed of by Mr. Justice James in the Quackenbush case, *supra* (20 D. C., 312), where he so well says:

"It is worth while, however, to note an argument *ab inconvenienti* which is stated in the form of an averment in the answer. It is there alleged that, if the construction insisted on by the complainant, and now conceded by the court, should prevail, the statute itself would be virtually nullified.

"We can only understand this to be a suggestion that the public cannot afford to take land for streets and roads on the terms which would result from that construction of the law; and that the alleged practice of the last quarter of a century should be sustained because it works an economy in the taking of private property for public use. Such a suggestion implies that this economy is to be accomplished by an early cutting off of claims, in case an owner, who might not be willing, and might not intend, to give his property without compensation, should be slow in demanding it.

"We suppose there is no public policy which requires the executive, much less the judicial authorities, to be astute to diminish the chances of a demonstrable private right; especially of a right which the people have been so careful to guarantee by their fundamental law. The rights of the individual are at all times, even with the best protection, in jeopardy enough from combined private interests; and even public power has a tendency to disregard them. It was just because of the known readiness of communities to satisfy their convenience at the cost of the individual, that this guaranty was provided. We are not left to infer its meaning and temper from this single line of the fifth amendment. An intense estimate of private right had been a tradition of the race from a time even beyond *Magna Charta*."

Wherefore it is respectfully submitted that the judgment of the Court of Appeals is correct and should be affirmed.

SAMUEL MADDOX,
Attorney for Appellees.

Supreme Court of the United States.

No. 331.—October Term, 1902.

Henry B. F. Macfarland, John W. Ross and John Biddle, Commissioners of the District of Columbia, Appellants,
vs.
Jesse Brown and Rosa Wallach.

Appeal from the Court of Appeals of the District of Columbia.

[December 1, 1902.]

Under the act of Congress entitled "An act for the extension of Pennsylvania avenue southeast, and for other purposes," approved March 3, 1899, (30 Stat. 1381,) the Commissioners of the District of Columbia were by the terms of section 5 of said act "authorized and directed to institute a petition in the Supreme Court of the District of Columbia, sitting as a District Court, a proceeding to condemn the land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet." The provisions of said section 5 are as follows:

"Sec. 5. That within ninety days after the approval of this act the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to institute by a petition in the Supreme Court of the District of Columbia, sitting as a District Court, a proceeding to condemn the land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet.

"That of the amount found due and awarded for damages for and in respect of the land condemned under this act for the extension and widening of said Sherman avenue not less than one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting on both sides of Sherman avenue, and the extension thereof as herein provided, to a distance of three hundred feet from the building lines, on the east and west sides of Sherman avenue as widened and extended: *Provided*, That no assessment shall be made against those pieces or parcels of ground out of which land has already been dedicated to the District of Columbia for the purpose of widening Sherman avenue as herein provided for."

Under the authority thereby conferred a petition was filed by the Commissioners of the District of Columbia in the Supreme Court of the District of Columbia, sitting as a District Court, upon the 31st day of May, 1899, being No. 555 on the District Court docket, praying that the court direct the marshal of the District of Columbia to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and

appear on the premises on a day specified, to assess the damages, if any, which each owner of land through which Sherman avenue is proposed to be extended and widened, as aforesaid, may sustain by reason thereof, and that such other and further orders might be made and proceedings had as were contemplated by said act of Congress and by chapter XI of the Revised Statutes of the United States relating to the District of Columbia, to the end that a permanent right of way for the public over the said lands might be obtained and secured for the aforesaid extension and widening of Sherman avenue.

Upon this petition the said court on the 16th day of September, 1899, passed an order requiring interested parties to appear in said court on or before the 2d day of October, 1899, and show cause why the prayer of said petition should not be granted, and why the proceedings directed in said act of Congress should not be taken. Pursuant to such order, the jury was summoned and empaneled by the marshal, and upon the 7th day of February, 1900, were sworn according to law, and thereafter the said jury proceeded according to the provisions of chapter XI of the Revised Statutes of the United States relating to the District of Columbia, and having been upon the premises, in accordance with said statute, on the 1st day of May, A. D. 1900, made out their written verdict, which was signed by a majority of the said jurors. Upon the 9th day of May, 1900, the same was filed in the said court under the act of March 3, 1899.

Thereafter, on the 3d day of July, 1901, the trial court passed an order *nisi* confirming said verdict, and requiring all parties to appear and show cause on or before July 22 why such verdict should not be finally confirmed by the court. Upon July 22, 1901, the appellees, in response to said order, filed their exceptions to said verdict.

The court, having heard arguments upon the said exceptions, on October 2, 1901, passed an order overruling the said exceptions and finally ratifying and confirming in all respects the said verdict.

Thereupon the appellees appealed the case to the Court of Appeals. The Court of Appeals reversed the trial court, from which decision the Commissioners of the District of Columbia have appealed to this court.

Mr. Justice SHIRAS delivered the opinion of the Court.

Whether those provisions of section 263 of the Revised Statutes of the District of Columbia which provide for a second jury are applicable to this proceeding under the act of March 3, 1899; whether, if entitled to a second jury, the appellees waived such right by filing, in the Supreme Court of the District, exceptions to the verdict and award of the first jury and by appealing from the order of that court, overruling their exceptions and affirming said verdict and award, to the Court of Appeals of the Dis-

trict: and whether it was the duty of the Commissioners, and not the duty of the parties claiming to have been dissatisfied with the verdict, to demand a second jury, if a right to such jury exists, are important questions, and we can well understand why those who are entrusted with the administration of the law are anxious to have them speedily and finally determined.

But we are of opinion that the case is not before us in a condition to make it our duty to deal with those questions. The decree of the Court of Appeals, reversing the order of the Supreme Court, and remanding the cause to that court, "that proceedings may be taken and a jury of twelve ordered as directed by the statute," is not a final decree from which an appeal will lie to this court.

It is contended by the learned counsel of the appellants that the case is within the rulings of this court in *Phillips* v. *Negley*, (117 U. S. 665,) and in *Humphries* v. *District of Columbia*, (174 U. S. 190.) It is true that in the first of those cases this court entertained a writ of error to the Supreme Court of the District and reversed its judgment. But, in disposing of the question raised whether the judgment of the court below was or was not a final judgment, this court said:

"Interpreting the judgment of the general term by the opinion of the learned judge who spoke for the court, we must infer that it was intended to dismiss the appeal for want of jurisdiction to entertain it, on the ground that the order of the special term, vacating its own judgment, rendered at a previous term, was not only within the power of that court, but was so purely discretionary that it was not reviewable in an appellate court. The same consideration is urged upon us as a ground for dismissing the present writ of error for want of jurisdiction in this court, it being alleged that the order of the Supreme Court of the District at special term is not only within the discretion of that court, but that, as it merely vacates a judgment for the purpose of a new trial upon the merits of the original action, it is not a final judgment, and therefore not reviewable on writ of error. If, properly considered, the order in question was an order in the cause, which the court had power to make at the term when it was made, the consequence may be admitted, that no appellate tribunal has jurisdiction to question its propriety; for, if it had the power to make it, and it was a power limited only by the discretion of the court making it, as in other cases of orders setting aside judgments at the same term at which they were rendered, and granting new trials, there would be nothing left for the jurisdiction of an appellate court to act upon. The vacating of a judgment and granting a new trial, in the exercise of an acknowledged jurisdiction, leaves no judgment in force to be reviewed. If, on the other hand, the order was made without jurisdiction on the part of the court making it, then it is a proceeding which must be the subject of review by an appellate court. The question of the jurisdiction of this court to entertain the present writ of errortherefore necessarily involves the jurisdiction of the Supreme Court of the District, both at special and general term, and the nature and effect of the order brought into review, so that the question of our jurisdiction is necessarily included in the question of the validity of the proceeding itself. The legal proposition involved in the

judgment complained of, and necessary to maintain it, is, that the Supreme Court of the District at special term has the same discretionary power over its judgments rendered at a previous term of the court, without any motion or proceeding to that end made or taken at that term, to set them aside and grant new trials of the actions in which they were rendered, which it has over judgments, when such proceedings are taken during the term at which they were rendered; and that, this being true, the proceeding and order of the court, in the exercise of this jurisdiction and discretion, cannot be reviewed on appeal or writ of error."

The court proceeded to consider the question at length, and having determined that the Supreme Court of the District had no discretionary power to set aside judgments obtained at a previous term where no proceeding for that purpose had been taken at that term, held that the court had acted without jurisdiction, and that its judgment was void and reviewable on error.

The distinction between that case and the present one is, therefore, seen in the fact that, in the one, the Supreme Court of the District acted without jurisdiction, and in the other the Court of Appeals was in the regular exercise of its appellate power in reversing the judgment of the Supreme Court of the District and awarding further proceedings. Such action in the present case may have been erroneous, but if so we cannot correct it until brought before us by an appeal from a final judgment. The further proceedings may possibly reach such a result that neither party will desire an appeal.

In *Hume* v. *Bowie*, (148 U. S. 245,) where this court dismissed a writ of error to the Supreme Court of the District of Columbia upon the ground that the judgment brought here by the writ was not a final judgment, the case of *Phillips* v. *Negley* was considered, and the distinction between a judgment ordering a new trial when the court has jurisdiction to make such an order, and a judgment where such jurisdiction does not exist, was pointed out by the Chief Justice, and where it was held that, in the former case, where jurisdiction existed, a judgment setting aside the judgment of the trial court, and awarding a new trial, is not a final judgment reviewable on error, and in the latter case, where jurisdiction had ceased to exist, by reason of lapse of time, a judgment awarding a new trial is without jurisdiction, would be an order in a new proceeding, and, in that view, final and reviewable.

The other case relied on, *Humphries* v. *District of Columbia*, was a case where, in the Supreme Court of the District, a verdict had been signed by all twelve of the jurors, but one of them was disabled by illness from being present in court when the verdict was delivered. Upon this verdict a judgment was entered. Proceedings in error were taken, but were dismissed by the Court of Appeals on account of a failure to have the bill of exceptions prepared in time. Thereafter, and at a succeeding term, the

defendant, against whom judgment had been entered, filed a motion to vacate the judgment on the ground that there was no valid verdict, which motion was overruled. On appeal to the Court of Appeals this decision was reversed and the case remanded, with instructions to vacate the judgment, to set aside the verdict and award a new trial. This ruling was based on the proposition that the verdict was an absolute nullity, and therefore the judgment resting upon it void, and one which could be set aside at any subsequent term. This view of the nature of the verdict was not approved by this court, which held that the defect or irregularity in the rendering of the verdict was mere matter of error, and not one which affected the jurisdiction.

In the present case no attack is made on the jurisdiction of either the Supreme Court of the District or of the Court of Appeals. That the decree of the latter court was not meant to be final is shown by its language, which does not definitely adjudge the whole subject matter, but anticipates further action of the Supreme Court. The litigation of the parties on the merits of the case has not been terminated. "The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term, as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered." (*Bostwick* v. *Brinkerhoff*, 106 U. S. 3.)

We do not overlook the fact that this statement of the law was made in a case where the appeal was taken directly from the decree of the trial court; but we think the principle on which the rule rests is applicable where the appeal is from the decree of an intermediate appellate court.

We are unwilling to make any departure from the rule that demands finality in a decree to render it subject to review on appeal. It would be very unfortunate if mere errors in the administration of statutes, of this character, not going to their validity, or to the jurisdiction of the courts below, could be brought here, from time to time, in advance of a final disposition of the controversy.

The appeal is *Dismissed.*

True copy.

Test:

Clerk Supreme Court, U. S.